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WISCONSIN REPORTS

161

CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

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FREDERIC K. CONOVER

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JUSTICES

OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME

JOHN B. WINSLOW
Ex officio CHIEF JUSTICE
ROUJET D. MARSHALL
ROBERT G. SIEBECKER
JAMES C. KERWIN
WILLIAM H. TIMLIN
JOHN BARNES
AAD J. VINJE

Attorney General - - WALTER C. OWEN

Clerk - - - CLARENCE KELLOGG (To Oct. 14, 1915)
ARTHUR A. MCLEOD (From Oct. 15 1915)

MEMORANDA.

Mr. Justice BARNES took no part in the decision of the case of *State ex rel. Owen v. Donald*, reported in 160 Wis. 21.

Mr. Justice TIMLIN took no part in the decision of the cases reported in this volume on pages 1–48, 55–70, 86–187, 198–301, 450–459.

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IN MEMORIAM.

NORMAN S. GILSON.

On the 14th day of September, 1915, Mr. Maurice McKenna of Fond du Lac addressed the court:

May it please the Court:—The committee appointed by the Fond du Lac County Bar Association for that purpose herewith present for record in this court a brief memorial of the life and services of the late Judge NORMAN S. GILSON, whose death occurred on the 21st day of September, 1914.

Memorial of the Fond du Lac County Bar Association.

NORMAN S. GILSON was born in Middlefield, Ohio, March 23, 1839, and is a representative of one of the oldest New England families, tracing his ancestry to Joseph Gilson, who about the year 1650 arrived in the new world from England. Among his descendants are those who participated in the French and Indian War, the Revolutionary War, and the War of 1812. Daniel Gilson, the grandfather of the Judge, was a soldier of the Revolution, and after the attainment of American independence established his home in Ohio, both he and his wife passing away at Middlefield in that state. They had a large family, which included Willard H. Gilson, who was born in Vermont and was a little lad of six years at the time of the removal of the family to the Buckeye state. The family home was established at Middlefield in 1817, and there the boy was reared to manhood, having such experience and enjoying such advantages as the pioneer conditions of the district afforded. He became a farmer, devoting many years of his life to tilling the soil. About 1865 he removed to Garrettsville, Portage county, and there his remaining days were passed, his death occurring in 1889 when he was seventy-eight years of age. For a number of years he survived his wife, who passed away in 1880 at the age of sixty-three. She bore the maiden name of Sylvia L. Frisby, and was also a native of the Green Mountain state. Her parents were Luther and Lovina (Garry) Frisby, who were also natives of Vermont and became early settlers of Mesopotamia, Ohio, where her father followed farming. At a later day they again moved westward, settling this time at Newburg, Washington county, Wisconsin, where Mr. Frisby died when well advanced in years. His widow subsequently removed to Milwaukee, where her death occurred when she had reached the very advanced age of ninety-four. They had several children, including Sylvia L., who became the wife of Willard H. Gilson, and unto this marriage were born seven children, the eldest of whom is the subject of this memorial.

Norman S. Gilson.

Judge GILSON, while spending his youthful days in Middlefield, Ohio, mastered the elementary branches of learning taught in the public schools there. He also became a student in Farmington seminary, and after putting aside his text-books engaged in teaching for one term. His early training for life was such as a farm gives. He became familiar with the best methods of tilling the soil and caring for the crops, but a professional career made an appeal to him and he determined to devote his life to other pursuits than agriculture. In 1860 he came to Wisconsin, settling in West Bend, and while teaching school there for two terms he devoted his leisure hours to the study of law in the office and under the direction of his uncle, Leander F. Frisby. For a brief period, too, he served as assistant postmaster of the town, but all business and personal considerations were put aside after the outbreak of the Civil War that he might espouse the cause of his country. He enlisted on the 17th of September, 1861, as a private of Company D, Twelfth Wisconsin Volunteer Infantry, with which he served for two years. The regiment, which was commanded by Colonel George E. Bryant, left Wisconsin on January 11, 1862, and the following month was assigned to duty with Doubleday's brigade of the department of Kansas. Two months were spent in active duty in Kansas and Missouri, and in April, 1862, the Twelfth Wisconsin was then stationed at Fort Riley and other points in Kansas, until it was transferred to the Army of the Tennessee and assigned to duty in the district of Mississippi under General Isaac F. Quimby. Judge GILSON was on detached service with the staff of General Robert B. Mitchell from June, 1862, until after the battle of Perryville, when he returned to his regiment, which later in the year was assigned to Ord's division in the district of West Tennessee. With the brigade under Colonel Bryant he took part in the expedition to Coldwater, Mississippi, in April, 1863, and participated in skirmishes in Hernando, at Perry's Ferry, and other points. In May, 1863, Judge GILSON was promoted to the rank of sergeant major of his regiment. He participated in the siege of Vicksburg with the Third brigade of the Fourth division, Sixteenth army corps, Colonel Bryant being in command of the brigade at the beginning of the siege. Following the capitulation of Vicksburg he took part in the siege and capture of Jackson, Mississippi, and his splendid military record won him promotion in August, 1863, to the rank of first lieutenant of Company H, Fifty-eighth U. S. Colored Infantry, which was formerly the Sixth Mississippi regiment. He was soon promoted to adjutant and eventually became lieutenant colonel of his regiment.

As a member of the staff of General Davidson he was assigned to duty as judge advocate of the Natchez district, and in 1865–66 was judge advocate for the department of Mississippi, serving on the staffs of Major General Osterhaus and Major General Thomas J.

Wood. Although his regiment was mustered out in 1865 he was retained as judge advocate for more than a year by direction of the secretary of war on account of the trial by court-martial of Captain Frederick Speed, who was charged with criminal carelessness in overloading the steamer Sultana with paroled prisoners, whereby 1,100 of them lost their lives when the vessel sank near Memphis, Tennessee, April 27, 1865. Colonel GILSON represented the government on that occasion, which was the most famous military trial held on the Mississippi during the war. On the 12th of June, 1866, he was mustered out, and was honorably discharged at Vicksburg. President Johnson brevetted him colonel of the United States volunteers "for efficient and meritorious service," and with the close of his military duty he returned to Wisconsin to resume his interrupted preparation for the bar.

In 1866–67 Judge GILSON was a student in the law school at Albany, New York, and following his graduation in the latter year was admitted to the bar. In 1868 he came to Fond du Lac, Wisconsin, where he opened a law office. No dreary novitiate awaited him. He soon won recognition as an able and learned lawyer who was faithful and conscientious in the preparation of his cases, and gained a high standing as an attorney. His clientage constantly grew in volume and importance and he came to be regarded as the peer of the ablest members practicing in the courts of this district. He was first called to office in 1874, when he was elected city attorney of Fond du Lac, Wisconsin. He filled the office of district attorney of Fond du Lac county, Wisconsin, for the years 1877–78. In March, 1880, the Democratic party named him its nominee for the position of judge of the Fourth judicial circuit, and he was elected by a majority of more than 8,000. No higher testimonial of his splendid judicial record can be given than the fact that in 1886 he had no opposition for the office, nor again in 1892. In 1898 he declined to become a candidate for another term and retired from the bench after eighteen years' service as circuit judge. From the outset of his professional career his record has reflected credit upon the history of the Wisconsin bar. The zeal with which he had devoted his energies to his profession, the careful regard evinced for the interest of his client, and his assiduous and unrelaxing attention to all the details of his cases brought him a large business and made him very successful in its conduct. His arguments have elicited warm commendation, not only from his associates at the bar but also from the bench. He was recognized as an able writer and his briefs show wide research, careful thought, and the best and strongest reasons that could be urged for his contention.

Judge GILSON had great respect for the dignity of judicial place and power, and no man ever presided in a court with more respect for his

environment. As a result of that personal characteristic the proceedings were always orderly upon the part of every one—audience, bar, and the officers, from the highest to the lowest. His opinions are fine specimens of judicial thought, always clear, logical, and as brief as the character of the case would permit. He never enlarged beyond the necessity of legal thought in order to indulge in the drapery of literature. His mind, during the entire period of his course at the bar and on the bench, has been directed in the line of his profession and his duty.

In 1899 Judge GILSON was appointed a member of the Wisconsin tax commission, and served in that capacity from the latter part of that year until the 1st of May, 1911, when he resigned. He was chairman of the commission from December, 1899, to the time of his resignation. His judicial training and experience proved of much benefit in settling many vexed questions before that commission, and again he made an unassailable official record.

On the 17th day of October, 1905, Judge GILSON was married to Miss Laura B. Conklin, a daughter of Lanty Conklin and Maryette (Bristol) Conklin, who survives him. Judge GILSON's membership relations extend to Fidelity Lodge No. 19, K. P. He was also a member of the Grand Army of the Republic, the Loyal Legion, and the Society of the Army of the Tennessee, and thus maintained his deep interest in and pleasant relations with his old army comrades. In every relation of life he has measured up to the highest standards of citizenship and manhood. A broad and liberal-minded man, his entire life was devoted to the best interests of his fellow townsmen, individually and collectively. His activities have indeed been a serviceable element in the world's work, and, while he never courted publicity, the simple weight of his character and ability has carried him into important relations.

After a very brief illness he died at his home in Fond du Lac, Wisconsin, on the 21st day of September, 1914.

Judge N. S. GILSON occupies an enviable niche in the honorable galaxy of distinguished lawyers who from time to time have graced the judicial bench presiding over the circuit courts of the state of Wisconsin.

Your committee recommend that the foregoing memorial be adopted and spread on the records of our association; and the president of our association be directed, as soon as practicable, to ask to have the same spread on the records of the supreme court of the state of Wissin; and that a copy of the same be forwarded to the family of the deceased.

Dated May 3, 1915.

MAURICE MCKENNA,
C. A. FOWLER,
J. M. GOODING,
D. D. SUTHERLAND.

F. F. DUFFY,
P. H. MARTIN,
H. E. SWETT,
Committee.

Mr. Justice SIEBECKER, on behalf of the court, responded:

The death of Judge GILSON brings to our attention the conditions of the pioneer days embraced in the period spanned by his life. The memorial sets forth incidents of his life in the pioneer times of Ohio, where he sought the training afforded by the primitive schools of his rural community, as well as his advancement to the position of teacher in his native state and in this his adopted state. He was in youth attracted to the study of the law and chose the legal profession as his life work. To this end he pursued its studies, from the time he settled in Wisconsin, in the accustomed way, by devoting all his available time to the perusal of standard works on the law in the office of a practicing lawyer. But the pursuit of his legal duties was not to continue without interruption. At the outbreak of the Civil War he enlisted as a private in the Union army. His faithful service and his abilities in military affairs were soon recognized by his superiors and led to his promotion step by step until he became a commanding officer of his regiment. After his active service in the field he was retained as judge advocate, although his regiment was mustered out of the service. I recall the comments of the late Colonel George E. Bryant, who commanded Judge GILSON's regiment, stating that he was a brave soldier and an accomplished officer, whose loyalty and proficiency won for him the admiration and respect of the men in the ranks and his superiors in command.

In so far as I met Judge GILSON in the later years of his life, I observed that he cherished fond recollections of his army service. He always retained a deep interest in and a loyal devotion to the cause for which he fought and believed its success promoted the best interests of his country and its people.

His determination to adhere to his chosen career of a lawyer induced him, at the conclusion of his military service, to promptly resume his legal studies at the Albany Law School, which was followed by his entry upon the practice of the law in the city of Fond du Lac, where he made his home to the end of his life. He was soon looked upon as an able lawyer and a good citizen by the people of his community and state and they chose him to serve them in the responsible positions of city attorney, judge of the circuit court, and state tax commissioner. As a lawyer he displayed a comprehensive and accurate learning in the law and a faithful and conscientious devotion to its administration. In the trial of cases he acquired distinction for his painstaking preparation of briefs covering the law controlling the rights of his clients and the presentation of the essential facts involved in the controversy. His attributes and tenor of life inspired respect and confidence in his integrity and ability and prompted the people of the judicial circuit to intrust to him the function of admin-

istering the law as their circuit judge. His fitness and success in discharging this important public duty became so clearly and favorably known throughout the circuit that his eminent service in this office was continued until he voluntarily retired at the end of eighteen years.

Judge GILSON's labors as a circuit judge embraced a period of judicial history of the state wherein many controversies concerning the manifold rights of large industrial and commercial enterprises required readjustment and settlement in their extensive development under new conditions. He performed well his task in laying the foundation of the legal structure in this field of jurisprudence, and the fruit of this service will remain an enduring testimonial to his ability, his character, and his high legal attainments.

In personal characteristics Judge GILSON had none of the attributes that lead men to seek a public display of their personal affairs. In disposition and manner he was reticent and retiring. His active social intercourse was restricted to the circle of his immediate neighbors and close personal friends. This trait of his character did not, however, measure his interest in the welfare of his community and the people of his state. His manner of life did not fail to convey to his neighbors and associates the fact that he had an active interest and desire that favored all honorable means tending to promote their prosperity, though he did not give expression to these sentiments through public discussion or extended verbal utterances. His influence was felt in the community through the silent forces of his personality. By these characteristics the people learned to know and judge him and found him worthy of their confidence and trust. The legacy of his life has fully justified their judgment. At the conclusion of his judicial life he continued his public career as a member of the tax commission of the state. In this position his legal training and fidelity to public trusts eminently qualified him to undertake the discharge of the important state duties connected with this newly created office. His extensive experience in the affairs of life and his well known rectitude of judgment in dealing with complex problems arising in the affairs of men were of great aid in properly initiating the work for the solution of the tax problems of the state. The record of successful achievements of this commission during his twelve years of service shows that he maintained that high standard of faithful public service which had characterized his life in his careers of a soldier and a judge.

Judge GILSON's death brings to mind, as we recall the events of the early history of the state, that the ranks of the pioneer settlers are being reduced to but a few in number. But the measure of their achievements must assuredly awaken in the hearts of these survivors

the feeling of satisfaction and comfort that the fruit of their lives has built up a commonwealth which occupies an honorable position in the sisterhood of states and has bestowed a beneficent legacy upon their posterity. Judge GILSON will be remembered as one of these who was a distinguished patriot, an upright judge, and a good citizen in this noble work.

PLINY NORCROSS.

Mr. John M. Whitehead of Janesville then addressed the court:

May it please the Court:—The Rock County Bar Association appointed a committee to prepare and present to your honors a memorial to the late Captain PLINY NORCROSS, who was accidentally drowned in the mill race at Janesville, Sunday, July 11, 1915. In behalf of the committee I present the following and ask that it be made a part of the permanent records of the court:

Memorial of the Rock County Bar Association.

PLINY NORCROSS was born in the town of Templeton, Worcester county, Massachusetts, November 16, 1838. His father was Franklin Norcross, a farmer and lumberman, and his mother Lydia Powers, both of Puritan stock. The family came to Wisconsin and settled at La Grange, Walworth county, in 1852. The father died in 1875, the mother in 1892.

PLINY attended Milton Academy for two years and then entered the State University. His student days were abruptly ended the following spring by the outbreak of the Civil War. He enlisted April 16, 1861, in Company K of the First Wisconsin Infantry, under Captain Lucius Fairchild, the first University student to respond to the call for volunteers. Then he served three years as captain of Company K of the Thirteenth Wisconsin Infantry. Two of his brothers served with him, one dying at the front.

Captain NORCROSS married Phœbe A. Poole of Rock county on January 4, 1865. They had four children, Frederic F., John V., Elizabeth L., and Edward P. Mrs. Norcross died in 1900. The two older sons and the husband of the daughter, George A. Mason, are lawyers; the youngest son is a physician. All reside in Chicago.

Later Captain NORCROSS married Mrs. Frances Spaulding Redington of Troy, Pennsylvania, who survives him. There are also several grandchildren and two sisters.

After the war Captain NORCROSS engaged in the practice of law in Janesville, and was for some time the partner of the late Judge John R. Bennett, then for a short time of the late Hon. A. A. Jackson, and for a number of years of the late Judge B. F. Dunwiddie. Impaired

health led him to retire from practice over thirty years ago and engage in commercial pursuits, and with the change came a return of physical energy. He erected the first electric light plant in Janesville and one of the first in the state. He had also an interest in a flour and feed mill and a shoe factory. He was part owner of the Janesville water power and he owned and developed the power at Indian Ford. A few years ago he sold his principal interests in Janesville and thereafter took life more comfortably, spending his winters in Florida.

Captain NORCROSS twice served as mayor of Janesville. He was a member of the state legislatures of 1867, 1885, 1905, and 1907. He was department commander of the Grand Army of the Republic in 1904–5. Governor Davidson named him as a member of the board of University regents.

The professional career of Captain NORCROSS ended before any of the committee entered upon the practice and before any of your honors had come upon this bench; but we of the committee have known him and enjoyed his friendship, and such was his prominence in the state that he was doubtless well known to all of your honors. In his time he was a busy lawyer. He was city attorney of Janesville and district attorney of Rock county. He built up a lucrative professional business, and had such success in his commercial enterprises that when he retired from business he had ample means for his declining years.

His contemporaries of the Rock county bar, of whom a few are still in practice, attribute to him unusual qualities as an advocate. His early life, the normal period of preparation for a professional career, was broken up by his service in the army, and it is said that he never acquired the habits of a close student; but his natural gifts as an orator, his keen business judgment, his intellectual activity, his sound integrity, and above all his tireless industry, were such that he was able to succeed where even better read lawyers failed. His career at the bar was useful and honorable. It is understood that he declined two attractive professional opportunities to leave Janesville, one to become a United States territorial judge in the West and another to become a partner in a Milwaukee law firm.

Captain NORCROSS had a winning personality. Young men were drawn to him. He was extremely fortunate in his family life; both marriages were most felicitous. When financial difficulties in business harassed him, he always found a shelter in his home and a source of unfailing comfort and cheer in his wife and children.

In the legislature Captain NORCROSS was a recognized leader. He was faithful in attendance and kept himself so well informed as to

pending legislation that he was always ready for and equal to any emergency of debate upon the floor or in committee.

Captain NORCROSS was public spirited and alert to promote every interest of his city, county, state, and country. In politics always an active Republican, his zeal for his party prompted him, without waiting to be solicited, to offer his services as a speaker and to make liberal gifts in support of party campaigns. While department commander he attended campfires and reunions all over the state and spread good cheer far and wide among his old comrades. He often attended the national encampment. He had a wide acquaintance among public men within and without the state and was intimate with many who were recognized as the leaders of their day.

We have spoken of Captain NORCROSS rather as a man, as a citizen, and as a public leader than as a member of the bar. He was devoted to his profession while he followed it. That he had to give it up was a source of constant regret.

Captain NORCROSS was reared in the faith of the Congregational church, and died in the membership of the First Congregational Church of Janesville. A vast concourse of citizens attended his funeral in the church. The local post of the Grand Army of the Republic had the services in charge. The casket was draped in the flag of the Union. Rev. David Beaton, a former pastor and warm personal friend, spoke of him as a man of large and varied interests throughout his entire life. In his youth he left his studies to be a soldier in the army of the republic. He was an efficient commanding officer. He was an industrious and useful lawyer. He held public office, both local and state, always with distinction. He was a successful manufacturer. In all these useful activities he merited and received the esteem and commendation of the people.

JOHN M. WHITEHEAD,
MALCOLM O. MOUAT,
F. C. BURPEE,
Committee.

On behalf of the court, Mr. Justice SIEBECKER responded:

The memorial fittingly expresses deserving tributes to the memory of Captain NORCROSS. My personal acquaintance with Captain NORCROSS dates from the time he served as a member of the legislature in 1905 and in 1907. I then learned to know him as a man of winning personality who attracted men by his friendly social intercourse and the spirit of good fellowship. In his intercourse with others he manifested a wide interest in current events and the public problems of his day. His mental activity impelled him to participate

in the affairs of life to the end of his years. He was a man of marked intellectual abilities and a will power which enabled him to carry out his plans and purposes from the time he applied himself to obtain an education and become admitted to membership in the legal profession to the end of his active business life. These characteristics were the foundations of his successful business career after impaired health compelled him to retire from the practice of the law.

Captain NORCROSS had a deep and friendly interest in the State University and gave to it his time and attention by devoted and efficient service when called to the position of regent during the latter years of his life.

His patriotism to country found expression in his military service during the Civil War. He enlisted as a private at its beginning, and his meritorious service caused him to be soon promoted to the position of captain of his company, of which he remained in command until he retired from the service at the expiration of three years. Upon his retirement from military service he gave his attention to the study and practice of the law. He displayed high talents as an orator in his presentation of cases to juries and in his public speeches. His associates in professional life esteemed him highly for his integrity, his industry, and his abilities in the competent management of business affairs.

The strain of his professional service, however, overtaxed his physical powers and compelled him, when he arrived at the meridian of his years, to engage in an occupation less confining than the labors of a lawyer. Under these conditions he engaged in business pursuits and enjoyed a consequent improvement of health and a success in his business enterprises up to the time of retirement, several years before his demise. In business affairs he evinced a keen intelligence, a provident management, and sound judgment, the fruits whereof provided him and his family with abundant means to supply their needs in declining years.

Captain NORCROSS was in the full sense a man upon whom the people relied to conduct their public affairs. This characteristic of him is shown by their repeated demand on him to hold positions of public trust. He held the offices of city and district attorney; he was twice their city mayor; four times a state legislator; and for one term a member of the board of University regents. His public service was characterized by faithful attendance to duty, promotion of the public interests, and an industrious labor to acquire the necessary information for an intelligent discharge of his public functions. His success in this respect gained for him the commendation of a wide circle of men throughout the state.

Captain NORCROSS has departed this life, but he leaves to his fam-

ily, his friends, and to the community and the state a personal history exemplifying a manly, useful, and upright life in the service of what he believed would promote the happiness and welfare of his kindred, his neighbors, and the people generally. His record is one that left no duties unperformed and shows that he battled to the end to fulfil his ideals of a good husband and father and of a faithful and loyal citizen.

CHARLES HENRY LEE and ELBERT O. HAND.

Mr. John B. Simmons of Racine then presented the following

Memorials of the Racine County Bar Association.

CHARLES HENRY LEE was born at Racine, Wisconsin, on August 2, 1847, and there he passed away on September 8, 1914, after a residence of sixty-seven years.

His father, Alanson Henry Lee, was a native of Connecticut, and his mother, Permelia A. Gaylord, of New York. His grandfather was Brewster Lee, a descendant of Elder Brewster of the Mayflower and of a family of Lees which had been domiciled in New England for near two centuries when Alanson, at the age of twenty, left the parental roof to begin the westward pilgrimage which brought himself and his young bride to Racine in the year 1840.

Here Mr. LEE's father, with a partner, John Dickson, engaged in trade, and for nearly twenty years the firm held the leading place among the city's merchants. Alanson Lee died, however, just at the outbreak of the Civil War, when the business of the country was still suffering from a recent financial crisis, and the youthful CHARLES H. LEE was thrown practically upon his own resources.

Nominally his education was obtained in the public schools of Racine, then headed, it should be noted, by the well known educator, Colonel John G. McMynn, but in fact his whole life was a period of self-education through reading, observation, and reflection, and his mind became a storehouse of information and wisdom from which he drew at will.

Having early chosen the law for his profession, he entered upon its study in the office of C. W. Bennett, a local attorney of Racine, going later to the well known firm of Fuller & Dyer. Possibly as the result of the extensive practice which the law student of that day enjoyed in the art of writing, he became and remained to the end of his life an exceptionally fine penman. Later he entered the Albany Law School, whence he graduated in 1869. Returning to Racine he connected himself for two years with Fuller & Dyer as office manager.

During these years of his early training the Racine bar was exceptionally strong, and Mr. LEE enjoyed the inestimable privilege of association with some of the best legal minds and brightest intellects of that day.

In 1871 he formed a copartnership with the late John T. Fish under the firm name of Fish & Lee, which continued until 1878 and met with deserved success. It has been related by him that the only stipulation the partners made between themselves at the beginning was this: that no client who came to them should be denied legal assistance because he had not the wherewithal to pay.

As a lawyer Mr. LEE was scrupulously careful, painstaking, and thorough, and neat, orderly, and systematic in his habits; in short, a consummately skilful and expert workman. Invariably he displayed a keen and almost intuitive grasp of the legal principles applicable to the matter in hand, and whether inditing letters or legal documents never failed to express in concise, clear, and correct English the exact meaning he meant to convey. It is claimed that no pleading drawn by him was ever successfully challenged by demurrer. As a counselor he was able, wise, and eminently safe and trustworthy.

In 1878 he gave up his partnership with Mr. Fish to become general counsel for the J. I. Case Threshing Machine Company, in which position he continued until 1897, contributing no small share to that company's success. In the latter year he went abroad for the company, visiting most of the European countries, and on his return retired to devote his remaining years mainly to the care of estates and other business of a fiduciary nature; and no man ever attained and held in greater degree or more deservedly the confidence of his clientage, which was of the very highest character and imposed upon him heavy and exacting responsibilities.

On August 25, 1881, Mr. LEE was united in marriage to Emily A. Kelley, daughter of James H. Kelley, a prominent lumber merchant of Racine. This union proved a happy one, and their companionship for a third of a century illustrated the ideal marriage which results from mutual love and respect coupled with congenial tastes and dispositions.

As a citizen Mr. LEE served his community in many ways. He was district attorney in 1873–74; was for more than twenty years a trustee and treasurer of Taylor Orphan Asylum; was chiefly instrumental in securing Racine's public library, and served as president of the library board from its founding in 1896 until his death; and was prominent in helping to create and maintain Racine's efficient Central Association, the North Side Boy's Club, and other benevolent organizations.

In 1898 he was appointed by Judge SEAMAN a referee in bankruptcy and he still held that office at the time of his death. The appoint-

ment came to him unsolicited, and was accepted mainly because it enabled him to keep in touch with the younger members of the bar and with one form of active professional work. His administration of the office was marked by uncompromising integrity, judicial fairness, and sound common sense, and won general commendation.

Politically he was known as a Democrat, but his was a partisanship which left wide scope for independent judgment and action, and if he thought his party wrong at any time upon a vital issue, as happened in the free silver campaign, he felt free to oppose it. He was simple in his tastes and refined in his pleasures. Toward religion his mind was open and receptive, and, as toward charity, his support was steady and active. To thorough learning in his profession he added the graces of a varied and generous scholarship. He was an excellent conversationalist and delighted in the society of the cultured and witty. Toward younger lawyers he was unfailingly kind, patient, and helpful.

This tribute from the board of directors of the Manufacturers' National Bank of Racine, of which he was a member, well portrays his character:

"He wore the ermine of a noble nature with courtly grace and dignified simplicity, and held converse with the wise and good of all ages in the congenial companionship of great souls who live again in the manifold volumes of his library. The purity of his life and the integrity with which he discharged every duty and trust enshrine his memory in each and every heart."

A lawyer of the old school in the best sense of that term, a high-minded and cultured gentleman, a justly honored and most useful citizen, an able financier and a trusted counselor and steward, we commend his character and ideals to those younger men who in this generation are striving to sustain the traditions and carry on the work of our illustrious profession.

JOHN B. SIMMONS,
D. H. FLETT,
MARTIN J. GILLEN,
Committee.

Judge ELBERT O. HAND, who died on the 19th day of June, 1915, at the extreme age of eighty-four years, was born in New Lebanon, Columbia county, New York, November 29, 1830, and was descended from English ancestors on both sides of the family. Both of his grandparents were natives of New York. When he was but a boy his parents removed to Walworth county, and while yet a boy he traveled to California in 1849, driving an ox team across the plain, arriving at what is now Placerville, and later worked upon the north fork of the American river. In 1853 he returned by way of the Panama route,

prepared for college at Leonie, Michigan, entering the sophomore class at the University of Wisconsin, and graduated in 1859, fifty-six years ago. The following year he spent in the law school at Albany, from which institution he graduated in 1860, making him a practitioner for fifty-five years.

In September, 1861, he was married to Margaret S. Budd of Rensselaer county, New York, and in the same year brought his bride to Racine. After establishing himself in Racine he soon worked up a lucrative practice, and in 1868 was appointed county judge of Racine county by Governor Fairchild, and was elected for three successive terms, holding that office for thirteen years—the longest term of any presiding judge of that court. In 1890 he was elected district attorney.

Judge HAND entered the firm of Lyon & Hand in 1861, which afterwards became Lyon, Adams & Hand. In 1881, having declined reelection as county judge, he became the senior member of the firm of Hand & Flett, which was continued until 1897, when Judge Flett left the active practice to become judge of the municipal court. On the retirement of Judge Flett his son, E. B. Hand, entered the firm, and more recently it has been known as Hand, Hand & Quinn.

JUDGE HAND was one of the old school of lawyers; a man of sterling character; a man of exemplary habits; a man wrapped up in his profession and in his family, faithful to his religious belief, and an enthusiastic church worker. No better evidence of his worth among his neighbors could be given than the fact that he held the highest position that a layman could hold in his church for more than a half century, and that he was also a representative of his church in the international gathering held in Scotland several years ago.

Judge HAND was ever considerate and kind to the younger members of the profession, being helpful, thoughtful, and considerate to them. He was a man who believed in the coming together of people who had differences, and avoided litigation where it could be avoided without great damage to his own clients. He was a firm believer in the idea of giving to his children the best education possible, and every one of his children was entered in the University of Wisconsin as a student.

Judge HAND was a man who was a great public benefactor, always willing to sacrifice his personal interest to the public good; a man of strong convictions, ever ready to give the benefit of his advice to those who could profit thereby, regardless of fee or reward. In the future work of our bar we shall miss his presence, his genial smile, his courteous treatment, his warm hand clasp, and his sympathetic encouragement.

MAX W. HECK,
Chairman of Committee.

Mr. Chief Justice WINSLOW responded on behalf of the court:

This court welcomes the tributes paid by the Racine bar to their deceased brethren and fully recognizes their fitness. Different as the two men were in temperament, life, and personal traits, they both did honor to our great profession, and it is fitting that we should now honor their memories.

In addition to this formal expression of approval on the part of the court, however, I feel that I should be untrue to the promptings of my own heart if I did not at this time say some things of a more personal and intimate character.

I knew the two men well; indeed I may say that I was bound to both of them by the ties of long and close friendship. With Judge HAND I commenced my legal studies and from him I received the first encouragement in my aspirations to become a lawyer; Mr. LEE I knew intimately from boyhood, and the friendship then begun was never afterwards broken or disturbed.

Let me speak of Judge HAND first. I entered his office to read law, as the phrase then was, in January, 1871. He was then county judge of Racine county, but carried on a general practice in addition to performing the duties of his office. He was just past forty years of age, in vigorous health, and was a splendid specimen of American manhood. It would not be true to say that Judge HAND was a deep student or a profound lawyer in the sense that he applied himself closely to the books,—indeed it seemed to me at times that he was mentally indolent; but he had a strong, logical mind, a natural sense of justice, and a great fund of good hard common sense, combined with business judgment, all of which stood him in wonderfully good stead. Easy of approach, affable in his manners, even-tempered and kindly in his disposition, he made very many strong friends, and he remained in the office of county judge term after term, although politically not in sympathy with the majority of the voters of the county.

I entertain no doubt that the holding of that office was a serious drawback to his career as a lawyer. He had in him all the qualities necessary to develop into a very exceptional lawyer; all that was needed was that he should be compelled to use those qualities in active practice. His official duties stood in the way of this, and when he at last retired from the judgeship it was too late. I say this not in disparagement of his abilities or his achievements, but simply by way of regret that he did not attain that commanding position at the bar which the native strength of his intellect and his strong character fitted him to attain. All of us need the spur of necessity in order

to exert our highest powers or attain our greatest possible success. During the years of Judge HAND's life which should have been most fruitful to him as a lawyer he was spending the greater part of his time in the routine duties of the probate office instead of meeting his legal brethren in the contests of the forum, and the consequence inevitably was that he did not reach the eminence as a lawyer which he might have reached had he been free to bring all his energies to the active practice.

My own remembrances of Judge HAND are of the kindest nature. I was in his office as student and afterwards as clerk and copyist for well nigh two years and the association was very close. I know he placed the greatest confidence in me, and I can truly say that he never gave me an unkind word or look, although my youth and inexperience must doubtless have often tried his patience. My later relations with him as a fellow practitioner and as a judge upon the trial bench were all of the same character. His life was long and useful; he died in the fulness of his years, secure in the possession of the respect and confidence of his fellowmen.

Mr. LEE was my senior by only a few years, and we were to all intents and purposes contemporaries at the bar, although he was in active and successful practice at the time of my admission. He had not the advantage of a university education, but this he abundantly made up in later years by independent reading and study. His mental grasp was comprehensive and at the same time exact. He had the faculty of applying his legal knowledge to the facts of a given case with remarkable rapidity and accuracy, and his industry was untiring. In the day when stenographers and typewriters had not yet usurped the place of the law student, he would sit at his desk all day and draw pleadings, contracts, and legal papers of all kinds with a readiness and precision which I never saw equaled; and I may say further that the papers which he drew were as admirable in their chirography as in their matter, and this is saying much. In his partnership with Mr. John T. Fish he naturally assumed the management of the office affairs of the firm and in this domain he was entirely at home. His business judgment was excellent; his methods of work orderly, not to say precise; his office was always in order; everything was done at the proper time; there were no defaults in serving pleadings or preparing for legal engagements; the entire routine of the office moved like clockwork without apparent effort. But I would not leave the impression that he was a mere office lawyer, for this would be far from the truth. His mind was naturally and strongly philosophical, his legal education was thorough; he was a learned lawyer as well as a business man, and he remained a student throughout his

whole life: a student not merely of the law, but of literature, philosophy, and the sciences as well. Not gifted as a public speaker, he had a felicity of written expression which few possess. Withdrawing from the active practice with a competence at a comparatively early age, he was able to indulge his taste for study and research, and he gladly did so. I believe the last years of his life were very happy years. It was not many months prior to his death that he had invited me to visit him at his new home in Racine to live over again the old days when we were companions at the bar, and I had hoped to do so, but the end came all too soon. It has been said with truth that

"Death walks so close to life we sometimes hear
His step beside us in the crowded ways;
The rustle of his somber robe betrays
His presence keeping even step and near
Beside us and the ones we hold most dear."

Death must have walked close beside our friend for long, but none heard his footsteps nor the rustle of his robe. Suddenly, when intellectual powers were unimpaired and years of happy usefulness seemed yet in store, the dread messenger revealed his presence and gave the summons which none may disobey. I think our friend would have wished it so had he been given his choice. There was no waiting and no weary longing for release. At once the active brain was stilled, the busy hand lay motionless, and the spirit of Racine's loyal and gifted son returned to the hand of Him that gave it.

The memorials will be spread upon the records of the court.

CLARENCE KELLOGG.

At the opening of court on the 26th day of October, 1915, Mr. Chief Justice WINSLOW read the following tribute:

The death of CLARENCE KELLOGG, for many years clerk of this court, which took place on the 14th instant, deserves more than mere passing mention.

Mr. KELLOGG, at the time of his death, had filled the office of clerk for more than thirty-seven years, having been appointed June 5, 1878, upon the decease of his father, La Fayette Kellogg, who had held the position from the date of the organization of the court on the 1st day of June, 1853, up to that time. Thus the service of father and son measured the entire life of this court.

The record of Mr. KELLOGG's service is certainly remarkable on account of its length alone, but there are other features of that service which are far more important and noteworthy. It was faithful, in-

telligent, and able service during every day of that long period; it was absolutely honest service; it could always be implicitly relied upon, and it was characterized by unfailing courtesy to all. It was, in fine, such service as can be rendered only by an able and high-minded gentleman, and this he was.

The duties of the office do not, indeed, require the greatest intellectual grasp, but they are important and by no means easy duties, and they demand an orderly and precise mind, industry, integrity, painstaking and constant care, and the ability to administer many details. Mr. KELLOGG brought these needful qualities to the work and thereby rendered very valuable service to the state and materially lightened the labors of the bench.

His disposition was modest and retiring, his tastes simple and domestic. He associated very little with his fellow-men, probably too little for his own good, but it resulted from this that his mind was never distracted by outside activities. At the office during business hours his work engrossed his entire attention, and when the business of the day ended, his beautiful home by the lake side claimed his time and his thoughts. Here, with his family, his happiness was apparently complete, and here he chiefly loved to be. The winds, the trees, the waters, and the birds told him a story which was ever marvelous and of which he never tired.

His death was in many ways ideal. The loving companion of his life's joys and sorrows had preceded him but a few days; her sudden death seemed to stun his faculties and take from him all desire to continue the struggle; life held no more for him, and death came not as a destroyer, but as a benignant angel.

It is ordered that this tribute be spread upon the records of the court and published in the Reports.

CASES DETERMINED

AT THE

January Term, 1915.

ASTOR COMPANY, Respondent, vs. DENGEL, Appellant.

April 13—May 4, 1915.

Compulsory reference: Long account: Discretion: Municipal courts: Statute construed.

1. **How long an account must be in order to justify a compulsory reference is largely a matter of judgment and sound discretion on the part of the trial court. In this case, an account of twenty-nine items for legal services and disbursements, covering a period of about forty days, justified such a reference.**
2. **By sec. 56, ch. 23, Laws 1907, the municipal court of Outagamie county is given power to order a compulsory reference under sec. 2864, Stats. The proviso in sec. 2864 relating to municipal courts applies only to references by consent.**

APPEAL from a judgment of the municipal court of Outagamie county: THOMAS H. RYAN, Judge. *Affirmed.*

Action to recover $377.82 upon an account for legal services and disbursements. The plaintiff is the assignee of the firm of Cady, Strehlow & Jaseph, which performed the services. The account consists of twenty-nine items, all relating to a single action and covering a period from May 16 until June 26, 1913. The defendant admits that he employed Mr. Cady to examine the pleadings and consult with Mr. H. C. Sloan of Appleton in regard to an action against the city of Appleton which had already been brought by Mr. Sloan, and to assist in the trial thereof, and that he agreed to pay $25 per day for such services, but that the services actually rendered by Mr. Cady were not worth to exceed $50. The

present action was brought in the municipal court of Outagamie county and, against the defendant's objection, was referred to Paul V. Cary, Esq., of Appleton, to hear, try, and determine. The referee after hearing the evidence made findings in plaintiff's favor for the whole sum claimed, which findings were confirmed by the court and judgment rendered for the plaintiff thereon. From this judgment defendant appeals.

For the appellant the cause was submitted on the briefs of *Theodore Berg.*

For the respondent there were briefs by *Cady, Strehlow & Jaseph,* and oral argument by *M. H. Strehlow.*

WINSLOW, C. J. Held:

1. The question as to the necessary length of an account in order to justify a compulsory reference is largely a matter of judgment and sound discretion on the part of the trial court. Twenty items have been held sufficient. *Brillion L. Co. v. Barnard,* 131 Wis. 284, 111 N. W. 483; *Poler v. Mitchell,* 152 Wis. 583, 140 N. W. 330; *Turner v. Nachtsheim,* 71 Wis. 16, 36 N. W. 637. There was no abuse of discretion in the present case.

2. The municipal court of Outagamie county has power to order a compulsory reference under sec. 2864, Stats., because by sec. 56 of the act creating that court (ch. 23, Laws 1907) it is given all the powers of the circuit court in circuit court actions except as otherwise specially provided in the act. The clause in sec. 2864 to the effect that the provision for references upon written consent of the parties shall not apply to municipal courts and certain county courts has no application to the provisions authorizing a compulsory reference.

3. The findings of fact in the present case are sufficiently supported by the evidence.

By the Court.—Judgment affirmed.

AUGUST BRANDT & COMPANY, Appellant, vs. VERHAGEN and others, Respondents.

April 14—May 4, 1915.

Lease of farm animals: Increase: To whom belongs: Evidence: Oral testimony contradicting writing: Weight: Striking out unresponsive statement.

1. Where farm animals are leased for a season without reservation the increase belongs to the lessee.
2. Where a written lease for a season of live stock on a farm contained no reservation of the increase, evidence of an oral agreement that the increase should belong to the lessor was not admissible.
3. Testimony of the lessor in this case is *held*, even if it had been proper, not to be sufficient to establish anything inconsistent with the legal effect of an unconditional written lease of live stock.
4. Refusal to strike out such testimony, which was not responsive to any question asked, was error.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Reversed.*

Defendant *Lockery* leased to Cornelius Van Laarhoven a farm and some live stock thereon with the right to purchase the same. No reservation was made of the increase of the stock. There was such increase. The lessee mortgaged the same as his own. *Lockery* commenced an action against his lessee and attached the property. Then the mortgagee commenced an action of replevin against the officer who had possession of the property under the writ of attachment. *Lockery* was brought in as a defendant. Issue was duly joined. The main question litigated was whether the increase of the leased property belonged to the lessee at the time he gave the mortgage. If so plaintiff was entitled to recover. Evidence was permitted to the effect that the lessee verbally agreed not to sell any of the increase of the leased property; that it should be considered reserved to the lessor. A verdict was

rendered sustaining *Lockery's* claim and judgment followed accordingly against the plaintiff.

The cause was submitted for the appellant on the brief of *Francis S. Bradford* and *Albert H. Krugmeier,* and for the respondents on that of *Francis J. Rooney* and *Francis W. Grogan.*

MARSHALL, J. The evidence that the understanding was that the lessor should be the owner of the increase from the leased stock, clearly contradicted the written contract and was improperly admitted. Furthermore, it was not responsive to any question asked and should have been stricken out on appellant's motion which was made therefor. To the question: "Did you ever agree with Van Laarhoven as to having the right to mortgage, sell, or convey any of the stock on the farm?" *Lockery* was permitted, in the face of proper objections, to testify: "I forbid him to sell or mortgage. That was the understanding that he was not to dispose of any of the increase of the stock. That was to remain my property and not disposed of." To permit that to stand, notwithstanding a proper motion which was made to strike it out, certainly was wrong and prejudicially so, since it appertained to a vital point in the case and, particularly, because Van Laarhoven was not available as a witness.

Had the evidence which was improperly admitted been proper, still it seems the court should not have taken it as sufficient to warrant taking the case from the jury in favor of respondents. By itself, it is far from satisfactory. In the face of the circumstance that *Lockery* caused the property to be seized in his civil action and held as property of Van Laarhoven, it is not of sufficient weight to establish anything inconsistent with the legal effect of the unexplained unconditional lease of the live stock.

The foregoing is so plain we are inclined to think the learned trial court was of the opinion that the increase belonged

to the lessor, in the absence of some agreement to the contrary. That is not the law. It is as claimed by appellant. A lease of live stock, as in this case, without reservation, carries with it the whole use thereof, including an increase of number of animals. That is a general rule to be applied in all cases of an unconditional lease for a season of farm animals. If a lessor does not wish to be bound by it he must protect himself by the terms of his contract. That rule is a very old one though probably seldom used. It is stated upon ample authority, and principle as well, in Law of the Farm by Thompson, § 349, cited to our attention by counsel for appellant. In *Moore v. Mohney,* 1 Mich. N. P. 143, cited by the authority and found often cited elsewhere, the court stated as the settled law: "Where animals are left for hire their increase belongs to the person who hires them," unless it be otherwise agreed upon between the parties when the contract is made. That manifestly does not apply to casual hiring but to letting for a term so that an increase would naturally be expected in the ordinary course of things as such animals are customarily kept.

By the Court.—The judgment is reversed, and the cause remanded for judgment in favor of plaintiff.

SWANSON, Respondent, vs. SWANSON, Appellant.

April 15—May 4, 1915.

Divorce: Alimony and allowances: Discretion as to amount: Not to be charge upon personalty.

1. The amount to be allowed in a divorce action as alimony and for the support of minor children rests largely in the sound discretion of the trial court.
2. Alimony or other allowances in a divorce action may, under sec. 2367, Stats., be imposed as a charge upon real estate of the party liable, but personal property cannot be subjected to such a charge.

APPEAL from a judgment of the circuit court for Douglas county: BYRON B. PARK, Judge. *Affirmed in part; reversed in part.*

This is an action by the plaintiff for a divorce from bed and board from the defendant upon the grounds of cruel and inhuman treatment.

It appears from the testimony that the plaintiff and defendant were married in 1902 at the city of Superior and that they have lived there continuously since that time. For a period of the past two years the defendant treated the plaintiff cruelly by constant use of indecent and abusive language to her, and he also neglected and finally abandoned her and the three minor children to live away from home with another woman. The plaintiff and defendant have three children; two boys of the respective ages of eleven and three years and one girl of the age of nine years, all of whom are in plaintiff's care and custody. Defendant is in the saloon business in the city of Superior.

The court found that defendant owned his homestead in the city of Superior, worth $3,000, with the furniture therein not valued; farm land worth $1,000; interest in a fishing lodge $75; saloon equipment and stock, exclusive of the business, is worth $1,250; an automobile worth $400; note of $50 and cash on hand $467, and has an income of $2,500 per year. Also that defendant owed current business bills amounting to $1,400.

The court upon the above finding of facts awarded plaintiff a divorce from bed and board and the custody, care, and education of the children; that she shall have the use of the homestead and furniture, and that defendant shall pay the taxes and make repairs on the homestead and keep it insured for $1,800, and that the plaintiff shall have the right to sublet any portion of the home. The court adjudged that the defendant shall pay plaintiff for her support and for the support, care, and maintenance of the children $100 per month,

and that the defendant is to pay the disbursements of the action and pay plaintiff's attorney $200. The judgment is made a lien upon the homestead property and farm land and on all other property of the defendant to secure the payment of the moneys required to be paid by him, and that the lien may be raised on any of said property by defendant giving bonds to be approved by the court. From such judgment this appeal is taken.

The cause was submitted for the appellant on the brief of *Grace, Hudnall & Fridley,* and for the respondent on that of *Victor Linley.*

SIEBECKER, J. 1. The question as to what, under the facts and circumstances shown and the actual value of defendant's estate, was a proper amount to be allowed as alimony to plaintiff and for the support and maintenance of the three infant children in her care and custody was one largely within the sound judgment and discretion of the trial court, to whom the parties submitted their domestic difficulties. We do not find that the allowances made by the court are excessive and unreasonable in the light of the facts found by the court.

2. The judgment provides that the judgment "shall be a lien upon the said homestead property . . . and all other of defendant's property to secure the payment of the moneys required to be paid by him, . . ." and that such lien may be removed in whole or in part by the giving of a bond approved by the court. This language is broad enough to impose the judgment as a charge upon defendant's personal property. The statute (sec. 2367, Stats. 1913) declares that by the judgment of alimony or other allowance in divorce actions, ". . . the court . . . may impose the same as a charge upon any specific real estate of the party liable. . . ." There is no authority given to subject a party's personal property to such a charge in divorce actions. The judg-

ment must therefore be modified in this respect. The statute commits the enforcement of the payment of alimony very broadly to the discretion of the trial courts. This court therefore remands this cause with directions to the trial court that the part of the judgment awarding alimony and imposing the judgment as a charge on defendant's real estate is affirmed, and that the part of the judgment which imposes it as a charge on defendant's personal property is reversed, neither party to recover costs in this court. The defendant is to pay the clerk's fee.

By the Court.—It is so ordered.

KOENIG, Appellant, vs. SPROESSER and another, Respondents.

April 15—May 4, 1915.

Negligence: Automobiles: Collision with carriage: Passing from behind: Duty to give warning: Evidence: Instructions to jury: Harmless errors: New trial: Perverse verdict: Constructive denial of motion.

1. In an action for the injury to plaintiff's horse and carriage caused by collision with an automobile, the jury having acquitted plaintiff's driver (his minor son) of negligence, any error in admitting evidence that he was careless became immaterial; nor could plaintiff have been prejudiced by the refusal to give requested instructions as to the law relating to negligence of children.
2. The admission of evidence on defendants' behalf as to how the defendant who was driving the automobile when the collision occurred had driven it at various times before the accident, was not prejudicial error, although such evidence was perhaps not competent.
3. Although the jury found that neither driver was negligent and that neither party sustained any damage, the verdict was not necessarily perverse.
4. It is not error to refuse to give requested instructions which are sufficiently covered by the charge given.

5. In an action for injury caused by collision between a horse and carriage and an automobile, a charge to the jury to the effect that owners of automobiles and of horses have equal rights on the public highway; that it is the duty of the driver to give warning to one driving a vehicle in front before attempting to pass; that the sounding of an automobile horn is the usual way of giving warning; that although there was no statute on the subject at the time of the accident it was the custom for a driver coming up behind another vehicle and passing it to turn to the left, and for the driver of the vehicle ahead to turn to the right, but that such rule or custom was not inflexible and might be varied by circumstances—was, at least, not prejudicially erroneous.

6. Under sec. 2878, Stats., a motion for a new trial on the judge's minutes, made but not decided during the term at which the trial was had, must be deemed constructively overruled.

APPEAL from a judgment of the county court of Jefferson county: CHARLES B. ROGERS, Judge. *Affirmed.*

This action was brought to recover damages on account of a collision between the plaintiff's horse and buggy and the defendant *W. D. Sproesser's* automobile. It is charged in the complaint that the defendant *Jacob Sproesser* carelessly and negligently ran into the horse and carriage of plaintiff, which horse was being driven with due care by the minor son of the plaintiff. The damages claimed to the plaintiff's horse and carriage are $138.52.

The defendants denied negligence and set up a counterclaim to the effect that the defendants exercised due care and that the minor son of the plaintiff acted with authority of the plaintiff and carelessly and wilfully drove the plaintiff's horse and carriage in front of defendants' automobile and brought said horse and carriage to a sudden standstill, causing the carriage to collide with the lamps and fender of said automobile, causing damage in the sum of $39.50.

The jury returned the following verdict:

"(1) Was the defendant *Jacob Sproesser* guilty of negligence or want of ordinary care in the management of the automobile at the time and place in question? *A.* No.

"If you answer the above question 'Yes,' then answer this one:

"(2) Was such want of ordinary care the proximate cause of the accident? *A.* ——.

"(3) Was Franz Koenig, the son of plaintiff, guilty of negligence or want of ordinary care in the management of plaintiff's horse and buggy at the time and place in question? *A.* No.

"If you answer the above question 'Yes,' then answer this one:

"(4) Was such want of ordinary care the proximate cause of the accident? *A.* ——.

"(5) What amount of damages, if any, estimated in money, did the plaintiff, *R. P. Koenig,* sustain in consequence of the accident? 1. To his horse. *A.* None. 2. To his buggy. *A.* None.

"(6) What amount of damages, if any, estimated in money, did the defendant *W. D. Sproesser* sustain to his automobile in consequence of the accident? *A.* None."

For the appellant there was a brief by *Lueck & Kuenzli,* and oral argument by *Otto Kuenzli.*

Gustav Buchheit, for the respondents.

KERWIN, J. 1. The first error assigned is that the court erred in admitting testimony to the effect that it was the custom of Franz Koenig, son of plaintiff, when driving into the yard not to look around. There was no prejudicial error in this. The effect of it was to show that the minor son was a careless driver, but the jury acquitted him of negligence.

2. The second error assigned is that the court erred in permitting the witness Minnie Sproesser to testify as to the manner in which the defendant *Jacob Sproesser* drove the automobile at various times previous to the accident in question. The evidence was perhaps not competent, but we think it was not prejudicial.

3. Error is assigned because the court refused to cause the jury to retire for the purpose of correcting the special verdict

so as to change the answers and answer such questions as had not been answered. It is insisted under this head that the undisputed evidence shows damage, therefore the verdict is perverse because the jury found no damage; and further it is said that either plaintiff's son, who drove the horse, or defendant *Jacob Sproesser* must have been guilty of negligence. It does not follow that either must have been negligent. They may both have been free from negligence and the collision the result of an accident. Nor does the finding of no damage necessarily show that the jury were actuated by passion or prejudice. *Parmentier v. McGinnis,* 157 Wis. 596, 147 N. W. 1007.

Error is assigned on refusal to give requested instructions and instructions given. The first and second requested instructions related to the rule of law as to negligence of children. The plaintiff could not have been prejudiced by refusal to give these instructions even if proper, because the jury found no negligence.

The third request related to the duty of the driver to give warning to one driving a vehicle in front before attempting to pass where it is dangerous to pass. There was no prejudicial error in refusal to give this instruction. It was sufficiently covered in the charge given. *Sobek v. George H. Smith S. C. Co.* 158 Wis. 517, 149 N. W. 152; *Dolphin v. Peacock M. Co.* 155 Wis. 439, 144 N. W. 1112.

4. The appellant claims error in the charge given to the effect substantially (1) that owners of automobiles and of horses have equal rights upon the public highway; that it is undoubtedly the duty of the driver to give warning to one driving a vehicle in front before attempting to pass without such warning, and that the sounding of an automobile horn is the usual way of giving warning; (2) that while there was no statute on the question at the time of the accident it was the custom for a driver coming up behind another vehicle and passing it to turn to the left, and for the driver of the ve-

hicle ahead to turn to the right. "This rule or custom, however, is by no means inflexible, but may be varied by circumstances."

It is claimed that these instructions were misleading and were calculated to confuse the jury. We do not think so. We think under the evidence of the case and so far as they went the instructions were not erroneous and certainly were not prejudicial. The accident occurred August 24, 1911. Upon an appeal here error must affirmatively be shown. *Manufacturers & M. I. Bureau v. Everwear H. Co.* 152 Wis. 73, 138 N. W. 624; *Adams v. Menasha P. Co.* 154 Wis. 577, 143 N. W. 658.

5. Error is also assigned because the court refused to change the answers of the jury to the special verdict and render judgment for the plaintiff, or in the alternative grant a new trial. The grounds upon which this error is assigned have been covered in part by what has been heretofore said. There can be no question but that the evidence was sufficient to support the answers, and we cannot say that failure to answer questions respecting proximate cause and damages prejudiced the appellant and shows that the jury was actuated by passion or prejudice.

It is lastly argued that the court erred in not granting a new trial for the reason that the judge who heard the motion was not the judge who presided at the trial, therefore had no jurisdiction or authority to enter judgment on the verdict. It seems that after the motion was made before the judge who heard the case it was thought by counsel on both sides that his term had expired and the motion therefore was taken up by his successor, Judge KIRKLAND, and argued before him, and he denied the motion.

It also appears from the record that the motion for a new trial was made in writing specifying the grounds, and the reporter's minutes were read to Judge KIRKLAND and the case fully presented to him by counsel for both sides. It is con-

tended by counsel for respondents that Judge KIRKLAND was qualified to hear the motion because counsel on both sides voluntarily appeared before him and consented to the hearing; and further, that if he did not have jurisdiction to hear the motion for a new trial it was constructively overruled by the statute. Sec. 2878, Stats., provides in part that "if such motion be made, but not decided during such term, it shall be taken as overruled, and an exception to such constructive denial of the same shall be allowed in the bill of exceptions."

The case was tried in the county court of Jefferson county and this statute is made applicable to that court. See ch. 71, Laws 1897.

We think the motion must be regarded as constructively overruled by force of sec. 2878, therefore other grounds presented need not be considered.

We find no reversible error in the record.

By the Court.—Judgment affirmed.

SCHROEDER, Administratrix, Respondent, vs. CITY OF WATERTOWN, Appellant.

April 15—May 4, 1915.

Highways: Defect causing injury or death: Evidence: Competency: Condition of road five days after accident: Contributory negligence: Law of the road: Municipal ordinance: Damages: Amendment of complaint: Special verdict: Separate submission of issues: Appeal: Harmless errors: Setting aside verdict.

1. In an action for death of a person alleged to have been caused by a hole in the street on which he was driving, there being evidence of the existence of the hole at the time of the accident and evidence tending to show that there was no material change in conditions for a long time thereafter, the testimony of a surveyor as to measurements of the hole made by him five days after the accident was competent.
2. The law of the road as established by statutes and decisions in this state deals with the duties of travelers at street and high-

way intersections, or when meeting one another, or when one wishes to pass another going in the same direction, but does not affect the question of contributory negligence in a case where a person was injured by a defect in the street while driving on the left side thereof and the evidence tended to show that he had necessarily veered to the left because teams were lined up on the right side.

3. The exclusion, as evidence in such case, of a municipal ordinance relating to the rule of the road but not shown to differ from the statute and common law, cannot be held error.

4. The complaint in an action for death of a person alleged to have been caused by a defect in a highway asked $5,000 as damages, but at the trial an amendment changing the amount to $10,000 was allowed. Upon the argument to the jury plaintiff's counsel stated that there might be some question as to the right to recover more than $5,000, and that plaintiff would be content with that sum. Objection to such argument being sustained, plaintiff was allowed to amend the complaint again so as to reduce the amount claimed to $5,000. *Held*, that the first amendment was properly allowed, and the allowance of the second was not prejudicial to the defendant.

5. Having pleaded as a separate defense that at the time of the accident the decedent's horses were more than momentarily beyond his control and were actually running away, defendant was fairly entitled to have that issue directly and specifically submitted to the jury in the special verdict; but the jury having been instructed that if they found such loss of control over the horses existed and was responsible for the injury, then they must find that the defect in the street was not the proximate cause of such injury, the refusal to submit the issue in a separate question cannot be held prejudicial error, although the practice pursued is disapproved.

6. Where a party is entitled to have an issue submitted separately in the special verdict, the fact that the question or questions proposed by him do not fully cover that issue does not excuse refusal of the court to submit appropriate questions.

7. This court will not reverse a judgment merely because in its opinion the verdict was against the preponderance of the evidence, where the trial court refused to set aside the verdict on that ground.

APPEAL from a judgment of the county court of Jefferson county: R. B. KIRKLAND, Judge. *Affirmed.*

On May 23, 1912, William Schroeder, while driving a

team of horses hitched to a wagon loaded with brick upon a highway known as Third street in the city of *Watertown,* was thrown to the ground and instantly killed. The plaintiff herein, as administratrix of the said deceased, brought this action to recover damages for his death. The complaint alleged that the accident was due to the insufficiency and want of repair of the highway, consisting of a deep hole in the street into which the wheels of the wagon dropped. The answer of the defendant denied liability and charged the deceased with contributory negligence and alleged that he was driving on the wrong side of the street and that at the time of the accident the team was beyond his control and was actually running away. The action was begun in circuit court, and after a mistrial, upon application by defendant for a change of venue, it was removed to the county court. The jury returned the following special verdict:

"(1) Was the street in question, at the time when and the place where it is claimed William Schroeder was injured, reasonably safe for public travel by persons in the exercise of ordinary care? *A.* No.

"(2) If you answer the first question in the negative, then answer this: Had such unsafe condition existed a sufficient length of time prior to the injury that the city, in the exercise of ordinary care on the part of its officers having charge of its streets, ought to have discovered such unsafe condition in time to have repaired it if they acted with reasonable diligence? *A.* Yes.

"(3) If you answer the first question in the negative, then answer also this: Was such unsafe condition of said street, at the time when and place where William Schroeder was injured, the proximate cause of the injury to said William Schroeder? *A.* Yes.

"(4) Did any want of ordinary care on the part of William Schroeder proximately contribute to produce the injury? *A.* No.

"(5) What sum of money will compensate the plaintiff for the damage she sustained by reason of the death of William Schroeder? *A.* $5,000."

From judgment entered in accordance with such verdict defendant appeals.

For the appellant there was a brief signed by *Otto Kuenzli,* special assistant city attorney, and *Kading & Kading,* of counsel, and oral argument by *Mr. Kuenzli.*

For the respondent there was a brief by *Bloodgood, Kemper & Bloodgood,* attorneys, and *Albert K. Stebbins,* of counsel, and oral argument by *Mr. Stebbins.*

BARNES, J. The appellant assigns error (1) in rulings on evidence; (2) in permitting amendments to the complaint; (3) in refusing to submit certain requested questions to the jury; (4) in refusing to direct a verdict; (5) in refusing to change certain answers in the verdict and enter judgment thereon for the defendant; (6) in giving instructions contrary to law; (7) in refusing to grant a new trial.

1. Two rulings are complained of under the first assignment of error. The first relates to the admission in evidence of the testimony of one Hyer, taken on a former trial of the action, Mr. Hyer having died in the meantime. He was examined and cross-examined on the first trial, and his evidence, if competent, was admissible under sec. 4141*a*, Stats. Appellant concedes this, but argues that Hyer's testimony was incompetent on the first trial and so should have been excluded on the second. Hyer was a surveyor, and five days after the accident measured the hole which constituted the alleged defect. It is insisted that proof as to the condition of the highway on May 28th had no tendency to establish its condition five days earlier. The hole in question was at a catchbasin, and we think the evidence pretty clearly established its existence at the time of the injury. There was evidence tending to show that there was no material change in conditions for a long time after the accident. In the absence of some showing that conditions had changed during the five days, it was proper to let the evidence go be-

fore the jury for what it was worth. The probability of any material change during the interim was slight. The delay in making the measurement might affect the weight of the evidence, but did not render it incompetent.

The other complaint in regard to rulings on evidence arises out of the exclusion of an ordinance of the city of *Watertown* pertaining "to the rule of the road relative to vehicles." It was alleged in the answer that the deceased was driving on the left-hand side of the street when injured and that he was negligent in so doing. The ordinance was offered on the issue of contributory negligence. It was rejected by the court as being incompetent and immaterial. Such ruling is assigned as error. We have been unable to find the ordinance in the record and do not know what its provisions were or whether the defendant was harmed by the court's ruling or not. The respondent argues in her brief that the ordinance was simply declaratory of the statute and common law as it existed and that its admission would tend to confuse the jury. Our decisions on the law of the road deal with the duties of travelers on meeting one another, or when one desires to pass another going in the same direction. *O'Malley v. Dorn,* 7 Wis. 236; *Wood v. Luscomb,* 23 Wis. 287. Sec. 1591, Stats., deals with the duties of travelers on meeting on a highway, and sec. 1636—49 establishes their duties at street and highway intersections. In the instant case the evidence tends to show that the deceased veered to the left because teams were lined up on the right side of the road and it was necessary to turn to the left in order to get by. We do not see where or how the law of the road could affect this case, unless the *Watertown* ordinance differs materially from the state law. The relevancy of the ordinance is not made apparent, and consequently there is no affirmative showing of error. It has been held that where the unlawful act of a person injured on a highway contributes to his injury there can be no recovery. *Welch v. Geneva,* 110 Wis. 388, 390,

85 N. W. 970; *Walker v. Ontario,* 111 Wis. 113, 117, 86 N. W. 566; *Lloyd v. Pugh,* 158 Wis. 441, 446, 149 N. W. 150. The evidence, however, does not bring the case within the rule of these decisions.

2. In her original complaint the plaintiff placed her damages at $5,000. At the beginning of the trial a motion was made to amend the *ad damnum* clause so as to claim $10,000 damages. This motion was made in the presence of the jury and was granted. In arguing the case to the jury plaintiff's counsel in substance stated that there might be some question about their right to recover to exceed $5,000 and that they would be content with that sum. On objection being made and sustained to this line of argument, plaintiff again moved to amend the complaint so as to reduce the damages claimed to $5,000, which amendment was granted.

It is argued that it was prejudicial error to grant these amendments; that there was no justification for applying for the first one; and that, having secured the amendment, plaintiff should not have been allowed to amend a second time and state in the presence of the jury the reason for falling back on the original complaint. While appellant's counsel acquits respondent's counsel of "jockeying" for the purpose of getting improper matters before the jury, it is argued at length that the maneuvering resorted to was prejudicial to the defendant, in that it tended to enhance the damages recovered and to lead the jury to the conclusion that the defendant was liable.

The defendant asserts that the amount of the plaintiff's recovery was limited by statute to $5,000. Plaintiff's counsel evidently wavered on the question, but concluded either that $5,000 was adequate compensation or else that it would not be wise to secure a verdict for a greater sum. By ch. 454, Laws 1885, recovery by one person for injuries on a highway was limited to $5,000. The general statute at this time and until 1907 limited the recovery for injuries resulting in

death to $5,000. By ch. 581, Laws 1907, sec. 4256 was so amended as to permit a recovery up to $10,000.

Reading these statutes together, bad faith could hardly be attributed to plaintiff's counsel in claiming the larger sum for damages, even if the claim was abandoned. Reading the construction placed on the statute by this court in *Moyer v. Oshkosh,* 151 Wis. 586, 600, 139 N. W. 378 (which seems to have been overlooked by counsel on both sides), it might well have been a kindness to the defendant to limit the liability to $5,000 finally. The first amendment was properly allowed, and the second one, if prejudicial at all, was prejudicial to the party who asked for and secured it.

3. The appellant requested the court to submit the following questions to the jury:

"If you answer the first question in the negative, then answer this question: 'Was the team driven by William Schroeder, at and immediately prior to being driven into the unsafe condition of the street, beyond his control?'

"If you answer the preceding question in the affirmative, then answer this question: 'Was such team so driven by William Schroeder more than momentarily uncontrollable at and immediately prior to being driven into such unsafe condition of the street?' "

The answer, as a defense to the action, set forth that at the time of the accident the team was in a condition of fright and more than momentarily beyond the control of the driver, and was actually running away. There being no reply, under the Code this allegation stood as denied by the plaintiff. The issue so raised constituted a distinct and separate defense and one that was sharply litigated on the trial. There is no doubt that under the authorities the defendant was fairly entitled to have this issue placed squarely before the jury by the submission of appropriate questions. The authorities dealing with the proposition are reviewed in *Wawrzyniakowski*

v. Hoffman & B. M. Co. 146 Wis. 153, 131 N. W. 429. See, further, *Sadowski v. Thomas F. Co.* 157 Wis. 443, 146 N. W. 770.

It is said, however, that there was no error in refusing to submit the proposed questions because they did not fully cover the issue which the defendant was attempting to raise. Under the law as laid down in *Ritger v. Milwaukee,* 99 Wis. 190, 74 N. W. 815, the questions submitted did not fully present the issue which was raised by the pleadings. This would hardly be a sufficient excuse in the present instance for refusing to submit appropriate questions. The duty of framing a special verdict devolved upon the court. The issue being raised by the pleadings and by the evidence, and the court's attention having been sharply directed to such issue by the request made, it was its duty to submit the proper questions covering the point. The failure to do so was error, and the only question is whether the error should be held prejudicial.

In the instant case the court charged the jury, under the question dealing with proximate cause, quite fully in reference to the defense under consideration. The jury was told that the defendant claimed the injury was caused because the horses became frightened and the driver lost control of them. Continuing, the court said:

"If you find it to be a fact that from any cause William Schroeder, shortly prior to reaching the hole, had lost control of his horses, which loss of control continued up to that point, and that his wagon struck the hole because of such loss of control, then the proximate cause of the injury was not the hole but the loss of control over the horses, or that which caused the horses to become uncontrollable."

The jury was advised that if it found that such loss of control existed and was responsible for the injury, then it must find that the hole in the street was not the proximate cause of such injury. In this respect the case differs from the *Hoff-*

man-Billings Case and from the cases therein cited. It presents the situation that was before the court in *Steber v. C. & N. W. R. Co.* 139 Wis. 10, 120 N. W. 502, where it was held that the error, if error there was, would be held to be nonprejudicial, because the court could not say that the jury would not follow the instructions given and assume that the conclusion reached was different from what it would have been had the proper specific question been submitted. While we hold that no reversible error was committed, we do not approve of the practice pursued. In all fairness the defendant was entitled to have the jury say directly and specifically whether or not the team was running away and beyond control momentarily, and whether the injury was the result of the runaway, if one was found.

4 and 5. The errors assigned upon the refusal of the court to direct a verdict for the defendant and in refusing to change the answers to certain questions in the special verdict and award judgment to the defendant on the verdict as changed are based on the proposition that the evidence was insufficient to sustain a verdict for the plaintiff. We have examined the evidence, and hold that it is sufficient to support the verdict.

6 and 7. It might have been proper enough for the trial judge to set aside the verdict as being contrary to the clear preponderance of the testimony on some vital issues, but, he not having seen fit to do so, this court will not reverse the judgment because in its opinion the verdict is against the preponderance of the evidence. We find no exception to the part of the charge complained of, and neither do we find any error in it.

By the Court.—Judgment affirmed.

NOLAN, Administrator, Appellant, vs. FIRST NATIONAL BANK OF JANESVILLE, imp., Respondent.
SAME, Respondent, vs. SAME, Appellant.

April 15—May 4, 1915.

Trusts and trustees: Devise of land subject to legacy: Executors: Limitation of actions: Legal and equitable remedies: Wills: Construction: "Reside elsewhere."

1. A devisee of land subject to the payment of a legacy charged as a lien thereon is not a trustee of an express trust, and an action by the legatee to enforce the lien may be barred by the statute of limitations. *Merton v. O'Brien*, 117 Wis. 437, followed.
2. The fact that the devisee is made executor of the will does not change the rule above stated, since the duty to pay the legacy devolves upon him as devisee, not as executor.
3. Even if, in such case, the devisee could not, as executor, invoke the bar of the statute, he might do so where he had been fully discharged as executor more than six years before the action was commenced.
4. Where the legacy so charged upon land provided for payment of a sum annually, a failure to pay for any one year gave the legatee a legal as well as an equitable remedy; and when the six-year statute barred the legal remedy it barred also the equitable one.
5. Where land, including testator's homestead, was devised to his son charged with the support and maintenance of the widow at said homestead so long as she should wish to remain there, and further charged with the payment of a certain sum annually to her "any year or years when she may for any reason reside elsewhere" than with said son, such language implies that no account should be taken of any absence less than a year; and where in each year the widow spent, in two or more separate visits, from one to four months with a daughter who lived in the same city a few blocks away—her room, furniture, etc., being all the time kept ready for her at the son's house,—no payments of money became due on account of such absences.

APPEALS from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Affirmed on plaintiff's appeal; reversed on that of defendant.*

Action to recover an alleged unpaid portion of a legacy under a will and to declare the amount recovered a lien upon

real estate. On January 12, 1892, Joseph M. Donahoe died testate leaving his widow, Bridget Donahoe, his only son, Joseph F. Donahoe, and two daughters, Katie E. Donahoe and Margaret V. Donahoe (now Nolan). At the time of his death he owned a farm of eighty acres in the town of Plymouth, Rock county, on which he lived, and also another parcel of land in the same town, some land in Nebraska, and personal property. He made bequests of money to his widow and to each of his daughters and also to some other relatives. His land in Nebraska was devised in equal shares to his daughters. The ninth paragraph of the will read:

"I give, devise and bequeath all the rest, residue and remainder of my real estate to my son, Joseph Donahoe, charged, however, with and subject to the payment of the bequests above mentioned to my said wife and to my said daughters, and further charged with and subject to the comfortable support and maintenance in health and in sickness of my said wife by my said son at the homestead portion of my real estate as long as my said wife shall live and desire to remain at said homestead, and further charged with and subject to the payment of the sum of three hundred dollars annually to my said wife any year or years when she may for any reason reside elsewhere than with my said son, and shall personally require of my said son, Joseph, the payment thereof in lieu of support and maintenance."

His son Joseph was named executor in the will and he qualified and acted as such. The legacies to the widow (except as to maintenance) and to the daughters are admitted to have been paid by Joseph. Since the action was originally begun both Bridget Donahoe and Joseph F. Donahoe have died, and *John E. Nolan* as administrator of the estate of Bridget Donahoe was substituted as plaintiff, and Kathryn L. Donahoe as administratrix of the estate of Joseph F. Donahoe was substituted for Joseph F. Donahoe as defendant. The *First National Bank of Janesville* claims a mortgage lien on the land sought to be charged with the unpaid legacy

in excess of its value and it alone of the defendants appeared and answered.

It is claimed that Bridget Donahoe chose to reside elsewhere than at the son's home and that she did so for seven or eight years. She was paid by her son $686 for the time she did not reside with him, but it is claimed there is still due from his estate the sum of $1,579 with interest. This sum is sought to be recovered and to be declared a lien on the land devised to the son prior to that of the mortgage of the defendant *First National Bank.*

Final judgment in the estate of Joseph M. Donahoe was entered February 13, 1906, assigning the lands in question to Joseph F. Donahoe charged with the support of his mother as provided for in the ninth paragraph of the will and discharging the executor. The trial court found that prior to February 13, 1906, Bridget Donahoe had elected to reside with her daughter Margaret Nolan for different periods, amounting in all to about seventy-four months, and had been paid by her son at various times prior to February 13, 1906, various amounts aggregating $686, but that she did not at any time require him to pay the full sum of $300 per year.

Since February 13, 1906, Bridget Donahoe resided with her son except for three months in 1906, four months in 1907, three months in 1908, one and one-half months in 1909, two months in 1910, one month in 1911, and four and one-sixth months in 1913. This action was begun August 13, 1913, and the residence of Bridget Donahoe with her daughter in 1906 and for two months of 1907 was more than six years prior to the commencement of this action, leaving fourteen and two-thirds months of residence away from her son within six years of its commencement, which at the rate of $300 per year amounted to $366.67. Bridget Donahoe personally requested Joseph F. Donahoe to pay her money for the purpose of compensating Margaret Nolan. The court held that claims growing out of residence away from the son accruing

six years or more prior to the commencement of the action were barred by the statute of limitations; that for the months above specified accruing within six years of its commencement plaintiff was entitled to recover, and that the sums so adjudged due with interest and costs were a lien upon the lands devised prior to that of the *First National Bank.* Judgment was entered accordingly. The plaintiff appealed from that part of the judgment which held claims accruing six years or more prior to the commencement of the action were barred by the statute of limitations, and the defendant *First National Bank* appealed from that part of the judgment which allowed recovery for fourteen and two-thirds months' residence with the daughter during the years mentioned.

The cause was submitted for the plaintiff on the brief of *Edward H. Ryan,* and for the defendant on that of *Jeffris, Mouat, Oestreich & Avery.*

VINJE, J. In *Merton v. O'Brien,* 117 Wis. 437, 94 N. W. 340, it was held that a devisee of land subject to the payment of a legacy charged as a lien thereon was not a trustee of an express trust, and that an action by the legatee to enforce the lien may be barred by the statute of limitations. The correctness of the decision is challenged by plaintiff and numerous foreign cases are cited to sustain the challenge. A careful re-examination of the whole subject has satisfied us of the correctness of the result reached in that case. The discussion of the subject in the opinion therein is so full and complete that no attempt will be made to add thereto or to restate the views there expressed.

It is claimed that the case at bar differs from *Merton v. O'Brien* because here the devisee is made the executor of the will. There are at least two reasons why that does not change the rule. First, because as executor no duty devolved upon the son to pay the legacy in question. He went into the

possession of the land at once and the duty to pay devolved upon him as devisee, not as executor. Second, upon the closing up of his father's estate he was fully discharged as executor more than six years before the commencement of the action. Since that time it is clear he owed no duty as executor to any one—his only duty being that of a devisee. Having been only a devisee for more than six years before the commencement of the action, he could invoke the bar of the statute as such even if he could not have done so as executor.

Failure to pay the legacy for any one year gave the mother a legal as well as an equitable remedy. She could sue the son at law to recover the amount due, or in equity for the same purpose, and have the amount recovered declared a lien upon the real estate. Having two remedies, the statute of limitations barred the equitable one at the same time the legal one was barred. *Casper v. Kalt-Zimmers Mfg. Co.* 159 Wis. 517, 530, 150 N. W. 1101, and cases cited. The trial court properly held that the six-years statute of limitations applied to plaintiff's cause of action.

The trial court found that the mother resided with her daughter a period of fourteen and two-thirds months during the years of 1907, 1908, 1909, 1910, 1911, and 1913, an average of a little over two months each year, the longest period being four and one-sixth months in 1913 and the shortest time being one month in 1911. Both son and daughter lived in the same city and only about seven or eight blocks apart. The testimony shows that during all the time the mother kept her room, furniture, and most of her personal belongings at her son's house; that the aggregate time each year as found by the court consisted of two or three or more separate visits; that when the mother felt like it she would go to her daughter and stay till she was ready to return to her son, who maintained a room for her and always cared for her when with him. The will provides that he shall pay her $300 annu-

ally "any year or years when she may for any reason reside elsewhere" than with him. The language itself implies that no account is to be taken of any absences less than a year. To construe it to require the son to be always ready to furnish her room and support and yet at the same time to require him to pay a proportionate sum for irregular short absences is to throw upon him an unreasonable burden and one not contemplated by the testator. He knew that if his son and daughter did not live far apart the mother would undoubtedly spend some time at her daughter's house. The times so spent as shown by the evidence were merely prolonged visits. During the years mentioned the mother continued to reside with her son within the meaning of the will, and the trial court erred in charging such visits up to the son's estate.

By the Court.—On plaintiff's appeal the judgment is affirmed; on the defendant's appeal the judgment is reversed, and cause is remanded with directions to dismiss the complaint.

HULL, Appellant, vs. DOHENY and others, Respondents.

April 15—May 4, 1915.

Fraud: Pleading: Sufficiency of complaint: Conspiracy: Vendor and purchaser of land: False representations.

1. A complaint alleging in substance that defendants, in accordance with a prearranged plan of action for their mutual profit, induced plaintiff to buy 320 acres of land in a distant state at $40 per acre, by false representations that it was worth more and that a third person, whose written offer was shown to plaintiff, stood ready to purchase it at once for $47.50 per acre, when as matter of fact the land was not worth to exceed $7 per acre, the letter was a fiction, and the alleged bidder did not exist,—is *held*, on demurrer, to state a good cause of action.
2. The action in such case is not for conspiracy, but to recover damages for a wrong committed by a number of persons who agreed

to act together to that end, the conspiracy being alleged merely to connect all the defendants with the overt acts of each individual.

3. The representation that there was a prospective purchaser for the land who had already made a *bona fide* offer of an increased price was a representation of fact, as distinguished from a promise or an opinion.

4. A mere expression of opinion as to the value of property will not constitute fraud, but trick or artifice must not be resorted to in order to throw the purchaser off his guard or prevent inquiry, especially where the property is in a distant state.

APPEAL from an order of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Reversed.*

This is an action to recover damages resulting from an alleged successful fraudulent conspiracy by the defendants, seven in number, by which the plaintiff was induced to purchase 320 acres of land in Kansas, paying $12,800 therefor, when the same was in fact worth only $2,240. A general demurrer to the complaint was sustained and the plaintiff appeals.

The complaint alleges in substance that the defendant *Kapke* on November 22, 1913, owned the land in question, and that on that date the defendant *Doheny* falsely and with intent to deceive represented to plaintiff that he (*Doheny*) could buy the land in question for $40 an acre and might sell it for $47.50 an acre, at the same time showing the plaintiff a letter purporting to be from one Cohan of Topeka, Kansas, offering $47.50 an acre for the land; that the plaintiff believed said representations, and relying thereon and believing that he himself could receive the profit of $7.50 per acre agreed to purchase the land of *Kapke* at $40 per acre, and made an advance payment of $500 on the purchase price, agreeing to pay $2,500 December 1st and the balance on or about January 1, 1914; that when the contract was signed *Doheny* pretended to wire said Cohan that he had closed the deal on the $47.50 offer and told the plaintiff that he would ask Cohan by letter to send $1,000 as the first payment and

the balance about February following; that on December 1, 1913, *Doheny* told the plaintiff that he had received $500 from Cohan and had obtained a certificate of deposit for the amount which he had left with the defendant *Fisher* to give to *Kapke;* that at about the same time *Doheny* told the plaintiff that Cohan had written to him that the defendant *Donnelly* would take the contract off the plaintiff's hands, but later told plaintiff that *Donnelly* informed him not to do anything for the reason that Cohan himself was coming to Janesville in a few days to close up the deal.

The complaint then relates several maneuvers of the defendants to impress the plaintiff with the wonderful value of his purchase, the first being a letter written from Kansas by *Fisher* to *Doheny* just before January 1, 1914, greatly exaggerating the value of the land and suggesting that he and *Doheny* buy it from plaintiff at $50 an acre, which letter *Doheny* showed the plaintiff; another being a representation made by *Doheny* and *Fisher* to plaintiff that one *Krans,* a relative of *Fisher,* wished to buy the land at $50 an acre, by which means plaintiff was induced to consent that *Doheny* return the $500 pretended to be advanced by Cohan and declare the Cohan deal off; another being that *Fisher* on January 5, 1914, paid plaintiff $500 for an option of five days on the land and stated that his relative *Krans* was going to get $70 an acre for the land and would arrive in Janesville in a few days to complete the purchase. The complaint further alleges that plaintiff on January 2, 1914, paid *Kapke* the balance of the purchase price of the land at $40 an acre, less an incumbrance of $2,000, relying on the truth of the representations of *Doheny, Fisher,* and *Krans* that the land was worth more or could be sold for more than $50 per acre, whereas the land was not worth to exceed $7 per acre.

It is further alleged that none of the representations as to the value of the land were true; that Cohan was a myth and his alleged letter manufactured; that neither *Fisher* nor

Kranz ever saw the land and *Kranz* was not a relative of *Fisher;* that the oral and written representations aforesaid were all made as the result of and in furtherance of a conspiracy and agreement between the several defendants for the purpose of selling the land to plaintiff at a much greater price than its value and dividing the profits among themselves. Judgment is demanded for the difference between the actual value of the land and the amount paid for it by the plaintiff.

The cause was submitted for the appellant on the brief of *Thos. S. Nolan* and *H. S. Dugan,* and for the respondents on a brief signed by *Jeffris, Mouat, Oestreich & Avery,* attorneys for *Philip Doheny, Jr., R. N. Jacobi,* and *Thomas W. Donnelly;* by *Charles E. Pierce,* attorney for *Frank W. Fisher* and *William L. Kapke;* and by *John L. Fisher,* attorney for *Ernest Krans.*

WINSLOW, C. J. If this complaint does not tell a plain tale of actionable fraud, it would be hard to find one that does. The gist of it is this: The defendants, acting in accordance with a prearranged plan of action for their mutual profit, induced the plaintiff to buy 320 acres of land in a distant state at $40 per acre, on the false representation that it was worth more than that sum per acre and that a third party, whose written offer was produced, stood ready to purchase it at once at $47.50 an acre; when as matter of fact the land was not worth to exceed $7 per acre, the letter was a fiction, and the alleged bidder did not exist.

It is difficult to imagine a more seductive fraud than this and we are at a loss to understand upon what ground the demurrer was sustained. It is not, as seems to have been thought, an action for conspiracy, but an action to recover damages for a wrong committed by a number of persons who have agreed to act together to accomplish that wrong, all being liable for all acts committed by any one of their number in furtherance of the concerted plan of action. The conspiracy

is alleged simply as a means of connecting all the defendants with the overt acts of each individual. *Martens v. Reilly,* 109 Wis. 464, 84 N. W. 840; *Randall v. Lonstorf,* 126 Wis. 147, 105 N. W. 663; *Gebhardt v. Holmes,* 149 Wis. 428, 135 N. W. 860.

The representation that there was a prospective purchaser for the land who had already made a *bona fide* offer of an increased consideration therefor was clearly a representation of a fact as distinguished from a promise or an opinion, and if false may well constitute actionable fraud. It is well established that a mere expression of opinion as to the value of an article will not constitute fraud, but trick or artifice must not be resorted to in order to throw the purchaser off his guard or prevent inquiry, especially where the property is not near at hand but in a distant state. *Morgan v. Hodge,* 145 Wis. 143, 129 N. W. 1083. The complaint fairly bristles with allegations of such tricks or artifices in the present case.

By the Court.—Order reversed, and action remanded with directions to overrule the demurrer to the complaint.

BASKFIELD, Administrator, Appellant, vs. MOLTHEN, Respondent.

April 16—May 4, 1915.

Gift by aged parent to one of her children: Undue influence: Mental capacity.

Findings of the trial court to the effect that an assignment of a note and mortgage, made by an aged parent about four months before her death to a son who, after coming to maturity, had continued to aid his parents and look after the home farm, was not obtained by the son by fraud or the exercise of undue influence, and that at the time of making such assignment the mother was of sound mind and memory and was acting of her own free will, are *held* to be sustained by the evidence.

APPEAL from a judgment of the circuit court for Jefferson county: GEORGE GRIMM, Circuit Judge. *Affirmed.*

Action to set aside an assignment of a note and mortgage on the ground that it was obtained by fraud and undue influence.

The facts, so far as necessary to present the questions involved here, were stated by the trial court in concluding the case, as follows:

Magdalena Molthen deceased, testate, June 23, 1910. Her will was duly admitted to probate. She left surviving several adult children and, among them, defendant *John Molthen.* Her husband predeceased her several years. For a long period they lived on a farm. They were advanced in years. All the children, except the defendant, soon after coming to maturity left the parents to their own resources and to care for themselves. He married some twenty years before his mother died. He lived with his parents for several years after the marriage, then went to live on a near-by farm; but continued to aid his parents for a time, then was recalled to the home to work the farm. He did that for some seven years thereafter. He then went to another farm in the neighborhood, but continued to aid in looking after the home farm. September 25, 1908, the deceased became the owner of the note and mortgage in question. The amount thereof was $2,000. January 13, 1910, it was duly assigned to defendant and the assignment was promptly placed on record. The mortgage and note which it secured were duly delivered with the assignment to defendant as his property in consideration of one dollar and natural love and affection and services theretofore rendered by him for the assignor. Mrs. Molthen contemplated making the assignment for some six months before it was done. She was of sound mind and memory and did the act of her own free will. Defendant did not exercise any undue influence or use any fraud to procure the making of the assignment. When she died she was worth some $6,000.

The evidence tended to show that only one of the four children, beside defendant, took any active interest in impeaching the gift of the mortgage to defendant; that there were strong reasons for his having been specially favored, and there were special reasons why the person who promoted the litigation was treated with less favor than some of the other children, particularly the defendant. The assignment was made some four months before Mrs. Molthen died and when there is little dispute but that she was of sound mind. The attorney who drew it and superintended its execution testified that Mrs. Molthen employed him, that she went to the bank and got the papers and directed what she wanted done; that she appeared to be fully competent to do business and to exercise judgment; that he had no words with defendant in respect to the matter; that he visited her at her house at the request of her physician for the purpose of enabling her to execute the assignment; that he read it to her and asked her if she was acting of her own free will and without talking with defendant about it; that she declared in the affirmative and that she had never talked with defendant about it; that he cautioned her in respect to the matter because of the special favor to defendant and of the circumstance of the assignment being made in his house, and that she persisted in declaring that it was what she wanted to do and that it was uninfluenced by any talk with her son.

On the facts found as aforesaid judgment was rendered dismissing the complaint with costs.

For the appellant there was a brief by *Chr. A. Christiansen,* attorney, and *J. E. & J. F. Malone,* of counsel, and oral argument by *J. E. Malone.*

For the respondent there was a brief by *Burke & Lueck,* attorneys, and *R. W. Lueck,* of counsel, and oral argument by *Robert Lueck.*

MARSHALL, J. The foregoing indicates sufficiently the issues in this case and the general features of the evidence.

Many minor details to which our attention was called on the argument have been considered; but do not change the stated general aspects of the case, and, therefore, it does not seem best to incumber the record with any particular reference to them.

While some errors are claimed to have occurred in regard to admission of evidence, there are none, in our judgment, which materially affect the result, hence that branch of the case will be passed without discussion.

There is left only a claim that material findings of fact are against the clear preponderance of the evidence. It does not appear so. The appellant seems to have signally failed to make out a case of undue influence. Granted that Mrs. Molthen was a little childish, that is quite characteristic of old people. She evidently had a very deep conviction of what she wanted to do with the note and mortgage. In face of the positive evidence that she procured them from the bank where she customarily kept them, employed an attorney to draft the proper paper for the transfer, later sent for him to attend her and supervise the execution, then emphatically declared that she wished to make the transfer, and that she had not said anything to her son *John* about the matter,—the findings complained of are well supported.

By the Court.—Judgment affirmed.

STOECKER, Appellant, vs. CITY OF CEDARBURG, Respondent.

April 16—May 4, 1915.

Municipal corporations: Street improvements: Changing flow of surface water.

A city has the right to change the natural course of surface water by improvements on its streets, even though the flow of such water to and upon adjoining lands is thereby changed.

APPEAL from a judgment of the circuit court for Ozaukee county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

This is an action to recover damages caused by surface water which it is alleged the city gathered into artificial water channels and discharged upon the plaintiff's land, and for the abatement of a nuisance.

The plaintiff and her husband were the owners of the land here involved. Since the cause has been tried in the trial court the husband has died and the action is continued in the plaintiff's name. It appears that the plaintiff owns land situated on Wurthmann street in the city of *Cedarburg.* There were no improvements upon this property. Wurthmann street intersects "Plank Road" on the west of and Hilbert and Depot streets on the north of plaintiff's property. The city some years ago constructed a drain pipe from "Plank Road," draining a piece of land east thereof which borders on plaintiff's land on the north. This drain was for the purpose of conducting the surface water and carried it to the intersection of Depot street, where it was discharged and thence flowed upon plaintiff's land. The plaintiff used this tract of land for agricultural purposes. She alleges that this discharge of the surface water damaged the crops, and further alleges that some of the residents discharged sewage into this drain and thus it constituted a nuisance. The testimony showed that before this drain was constructed the elevation of the land in the locality of "Plank Road," Hilbert street, and Depot street was such as to drain surface water on the plaintiff's land.

The circuit court, with the consent of the attorneys, discharged the jury upon the ground that it was an equitable action. The court found that the discharge of the surface water onto the plaintiff's land was not any greater than before the construction of this drain and that the city had not authorized any one to drain sewage from their premises into the street drain, and that if such use had been made of the

drain it was without the city's knowledge and consent. Judgment was entered dismissing the plaintiff's complaint and awarding defendant its costs and disbursements. From such judgment this appeal is taken.

Charles M. Scanlan, for the appellant.

For the respondent there was a brief by *William F. Schanen,* attorney, and *James D. Shaw,* of counsel, and oral argument by *Mr. Shaw.*

SIEBECKER, J. We have examined the record and find the evidence amply sustains the findings of fact of the trial court. The trial court properly held that the acts of the city in constructing the drain and improving the highway adjacent to plaintiff's premises did not increase the flow of the surface water onto the plaintiff's land and did not create a nuisance.

The city had the right to improve the "Plank Road" and the streets in the city and to change the natural course of the surface water by such improvement within the limits of the highways, even though such improvement changed the flow of such water onto adjoining lands. *Champion v. Crandon,* 84 Wis. 405, 54 N. W. 775; *Merkel v. Germantown,* 120 Wis. 494, 98 N. W. 210.

By the Court.—Judgment affirmed.

WAHRER, Appellant, vs. ALDRICH, Respondent.

April 16—May 4, 1915.

Nuisances: Roller skating rink: Injunction.

1. Where the operation of a roller skating rink, though involving considerable noise, is not physically annoying to persons of ordinary sensibilities, it is not a nuisance and the courts should not interfere therewith by injunction.
2. Where such a rink is located near the business center of a city, the rule applicable to one situated in a strictly residence district cannot be applied.

APPEAL from a judgment of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

Action for damages and for a permanent injunction restraining the defendant, who operated a roller skating rink opposite plaintiff's hotel, from causing or permitting noises usually attendant upon the operation of the rink. As facts the court found:

(1) "That plaintiff is, and was at the times alleged in said complaint, the proprietor and manager of the Hotel Waukesha, a commercial hotel situated on the corner of Main street and Gaspar street in the city of Waukesha, Wisconsin, under a written lease and contract to purchase said property; that both of said streets are paved with a vitrified brick pavement, and said hotel is one block from 'Five Points,' the business center of said city.

(2) "That the defendant, during the summer of 1913, conducted and operated a roller skating rink nearly opposite the hotel of the plaintiff and on the northerly side of said Main street, beginning on the 7th day of June, 1913, and continuing until the 8th day of September, 1913, when he was restrained by a temporary injunctional order issued in this action.

(3) "That defendant used, in connection with the actual operation of said roller skating rink, a mechanically-operated organ, and the plaintiff also had in the dining room of said hotel a mechanically-operated instrument that produced music of somewhat the same general character as the instrument of the defendant, but not so loud or shrill as that produced in the rink of the defendant, and was started by dropping a coin, or metal slug, in a slot connected with said instrument.

(4) "That the instrument in the hotel of the plaintiff was frequently played by those visiting the hotel, the plaintiff ordering the playing of said instrument to be discontinued at 10 o'clock in the evening, and his orders in this respect were generally heeded.

(5) "That the roller skating rink of the defendant, together with the organ operated in connection therewith, was open and operated up to 10:30 o'clock, and sometimes later, on the evening of each day of the week, except Sunday, and on Tuesdays and Saturdays the said rink was open until 11 o'clock in the evening and sometimes as late as 11:30.

(6) "That the hotel of the plaintiff is a three-story building, the walls of which are constructed of cut quarry limestone, and has a saloon business run in connection with it, from which drinks were furnished and served in the dining room of said hotel until 12 o'clock at night.

(7) "That the dimensions of the roller skating rink operated by the defendant is 75 feet wide and 150 feet long, with a hardwood floor laid in sections, covered over with a heavy canvas, and was an orderly and well-managed place for physical exercise and amusement, good order being always maintained, and boisterous and disorderly conduct was not allowed.

(8) "That the operation of said roller skating rink during reasonable hours, as conducted by the defendant, was not physically annoying to the plaintiff, or to any other person or persons of ordinary sensibilities, living in or resorting at said hotel; but that it was an unreasonable use of his property for the defendant to operate the rink beyond the hour of 10 o'clock at night.

(9) "That the immediate neighborhood in which said roller rink was operated is thickly populated, and that the operation of said rink as conducted by the defendant was not physically annoying to any of the permanent residents of ordinary sensibilities in the neighborhood; and that the homes of nearly all of the permanent residents in the neighborhood are so situated that the noise and music emanating from said rink would have the same or similar effect upon the persons in said homes as it would have on persons in the hotel of the plaintiff."

As conclusions of law the court found:

(1) "That the roller skating rink of the defendant, as operated and conducted by him on Main street in said city of Waukesha in the summer of 1913, was not and did not constitute a public nuisance.

(2) "That the operation of said roller skating rink by the defendant in the summer of 1913 was not and did not constitute a nuisance to the plaintiff or to his business and property, but that it was an unreasonable use of his property by the defendant to operate the rink later than 10 o'clock at night.

(3) "That the plaintiff is not entitled to a permanent injunction absolutely enjoining the defendant from the operation of said roller skating rink opposite his place of business on Main street in the said city of Waukesha, but that he is entitled to a judgment enjoining the operation of said skating rink after the hour of 10 o'clock at night and enjoining the practice of shooting blank cartridges in starting races.

(4) "That if it shall be finally decided, upon the appeal from the findings and judgment to be filed and entered in this action, that the plaintiff is not entitled to the injunction and relief prayed for in his complaint, or the plaintiff has failed to take and perfect his appeal, then the defendant, upon application to the court, shall be entitled to have the damages, if any, he may have sustained by reason of the temporary injunction issued at the instance of the plaintiff herein, ascertained by a referee or otherwise, as the court shall direct and determine, and as otherwise provided by the statutes in such cases and under the rules and practices of the court.

(5) "That the judgment in this action will be entered without cost to either party, except that the defendant shall pay the fees of the clerk of this court."

From a judgment entered accordingly the plaintiff appealed.

For the appellant there was a brief by *C. E. Armin,* attorney, and a supplemental brief by *J. F. Baker,* of counsel, and oral argument by *Mr. Armin* and *Mr. F. W. Hall.* They cited *Snyder v. Cabell,* 29 W. Va. 48, 1 S. E. 241; 6 Lawson, Rights, R. & P. §§ 3002, 3007; *Walker v. Brewster,* 17 Law Times, 135; *Pennoyer v. Allen,* 56 Wis. 502, 14 N. W. 609; *Stadler v. Grieben,* 61 Wis. 500, 21 N. W. 629; *Middlestadt v. Waupaca S. & P. Co.* 93 Wis. 1, 66 N. W. 713; *Tiede v. Schneidt,* 105 Wis. 470, 81 N. W. 826; *Price v. Oakfield H. C. Co.* 87 Wis. 536, 540, 58 N. W. 1039; *Wickham v. C. & N. W. R. Co.* 95 Wis. 23, 69 N. W. 982; *Hildman v. Phillips,* 106 Wis. 611, 82 N. W. 566.

For the respondent there was a brief by *E. D. Walsh,* attorney, and *Henry Lockney,* of counsel, and oral argument

by *Mr. Walsh.* They cited *McCann v. Strang,* 97 Wis. 551, 72 N. W. 1117; *Johnson v. Philadelphia,* 94 Miss. 34, 47 South. 526.

VINJE, J. The plaintiff claims that the ninth finding of fact to the effect that the operation of the rink, as conducted by the defendant, was not physically annoying to any of the permanent residents of ordinary sensibilities in the neighborhood, is not sustained by the evidence. He further claims that upon the facts found by the court he was entitled to a permanent injunction as prayed for.

As would be expected in a case of this kind there is a wide range in the testimony regarding the volume of noise made by the rink. Some described it as very loud and annoying and others as nothing out of the ordinary. All practically agreed that the noise made by the skating was that of a rather loud rumbling noise—much like that of a train passing over a bridge. Some found the music pleasant, some unpleasant, and upon others it seemed to have made no particular impression. There was medical testimony to the effect that the noise was not of a kind to physically annoy persons of ordinary sensibilities. Such rinks are common enough so that the testimony of each witness can, to some extent at least, be gauged by experience and observation. Upon the whole we think the trial court found the facts substantially as they existed—certainly his findings cannot be set aside as not supported by the evidence.

Do the facts found sustain the judgment? In *McCann v. Strang,* 97 Wis. 551, 72 N. W. 1117, the general rule governing cases of this kind is stated to be that courts will not abate a lawful business as a nuisance on the ground of noise alone, unless the noise and other incidents thereof are such as would be likely to cause some "actual, material, physical discomfort to a person of ordinary sensibilities, so circumstanced as the complaining party." It is therein further stated that "the

nature of the trade, the kind of noise, the location, and all the attending circumstances must be taken into consideration." The standard for measuring the nuisance qualities of the noise is its effect upon a person of ordinary sensibilities. It is to be gauged neither by a neurotic nor a phlegmatic temperament. To constitute a nuisance it must be physically annoying—it is not sufficient that it offend mere taste or what is ideally desirable. An actual effect of discomfort must be produced by it upon the average nervous organization before courts will interfere. *Price v. Grantz,* 118 Pa. St. 402, 11 Atl. 794; *Powell v. Bentley & G. F. Co.* 34 W. Va. 804, 12 S. E. 1085, 12 L. R. A. 53; note to *Acme F. Co. v. State* (34 Ind. App. 346, 72 N. E. 1037) 107 Am. St. Rep. 195 *et seq.;* 2 Wood, Nuisances (3d ed.) § 617; Joyce, Nuisances, § 183.

The business of the defendant was a lawful one. It was located within one block of the business center of the city of Waukesha. The court restrained its operation after 10 o'clock at night and forbade the firing of pistols for starting. No complaint can be made on the ground that it is permitted to operate at unreasonable hours, so as to disturb the sleep of any one during the usual hours of repose. Located as it is near the business center of the city, the rule applicable to one situated in a strictly residence portion thereof cannot be applied. The evidence establishes that considerable noise was incidental to plaintiff's own business. That is true of many a business located near or in residence sections, such as bowling alleys, dance halls, theaters, or other places of public amusement, stone-cutting works, planing mills, and the operation of most kinds of machinery. True, any of these may become a nuisance, but as ordinarily conducted they are not regarded as such. This world is full of noise, and city dwellers have to temper their enjoyment of it with more than the average amount. Upon the facts found and the test applicable thereto the circuit court reached the right result.

By the Court.—Judgment affirmed.

WISCONSIN DRAINAGE COMPANY, Appellant, vs. INDUSTRIAL COMMISSION and others, Respondents.

April 16—May 4, 1915.

Workmen's compensation: Dependence of parents on son: Presumptions: Burden of proof: Finding by industrial commission: Sufficiency of evidence.

1. **Dependence of parents upon their children will not be presumed; and parents claiming to be so dependent must, under sub. 3, sec. 2394—10, Stats., establish that fact by a preponderance of the evidence, the burden of proof being the same as in an ordinary civil action.**
2. **Evidence in this case that a deceased employee was accustomed to turn over to his mother a part of his earnings; that she spent the same for family support, as he probably supposed she would; and that it took all the money so turned over, and the ordinary family income as well, to meet the expenses, is *held*—even though the son expected to be paid back sometime when he needed the money to buy a farm—to sustain a finding of the industrial commission that the parents were partially dependent on him for support.**

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Action to impeach an award of the *Industrial Commission.* While in the employ of plaintiff, George Ganzer was so injured as to proximately cause his death under circumstances rendering the employer liable to his dependents under the Workmen's Compensation Act. He was an unmarried man, twenty-one years of age, working away from the parental home. He left home, took employment at $10 per week, and worked about a month before he was injured. In the meantime he visited home twice and turned over to his mother some $18 or $20. She used it for family support. He had been accustomed to turn his earnings over to his mother and obtain money back as he needed it. The parents owned a home valued at about $2,275, incumbered for $1,300, also a small amount of personal property. The father had an earn-

ing capacity of about $65 per month and was in fair working health, as was also the mother. George purposed saving to buy a farm and made his mother his banker; but without thought that she should keep the particular money he turned over to her. She took and used it as she had money he earned before he was of age. She estimated that he had been accustomed to turn over to her $15 per month more than he drew and said she spent the residue for family expenses.

The *Commission* found that the parents of deceased were partially dependent on him for support, fixed the amount at $180 per year, and the whole they were entitled to at $720. On the statutory appeal to the circuit court that was affirmed.

Robert R. Freeman, attorney, and *Timothy Brown,* of counsel, for the appellant, contended, *inter alia,* that it is the actual need of the support that determines the question of partial dependency. *Jackson v. Erie R. Co.* (N. J.) 91 Atl. 1035. The parents must have been dependent upon the deceased son in a material degree for support or maintenance or assistance and the obligation of such deceased son to furnish it must have rested upon some moral or legal or equitable ground, and not upon his purely voluntary or charitable impulses or disposition. *McCarthy v. Supreme Lodge N. E. O. P.* 153 Mass. 314, 318, 26 N. E. 866, 867; *Ballou v. Gile,* 50 Wis. 614, 619, 7 N. W. 561; *Pliska v. Hatton L. Co.* 1 Bulletins Ind. Comm. Wis. 95; *Dazy v. Appounaug Co.* 36 R. I. 81, 89 Atl. 160; *Reardon v. P. & R. R. Co.* 85 N. J. Law, 90, 88 Atl. 970; *Bortle v. N. P. R. Co.* 60 Wash. 552, 111 Pac. 788; *Kanton v. Kelly,* 65 Wash. 614, 118 Pac. 890, 121 Pac. 833; *Main C. Co. v. Davies,* 16 T. L. Rep. 460, 2 Workm. C. C. 108; *Andrzejewski v. Northwestern F. Co.* 158 Wis. 170, 148 N. W. 37.

For the respondent *Industrial Commission* there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.* They argued, among other things, that the test of dependency

is laid down by the statute itself, and is not the actual need of the alleged dependent, but the amount devoted by the deceased to his or her support. This is in accord with what is believed to be the better reasoned judicial decisions, under somewhat different statutes. No decisions under statutory provisions like ours have been found. They cited, among other cases, *Main C. Co. v. Davies,* 16 T. L. Rep. 460, 2 Workm. C. C. 108; *Howells v. Vivian & Sons,* 85 Law Times, 529, 4 Workm. C. C. 106; *French v. Underwood,* 19 T. L. Rep. 416, 5 Workm. C. C. 119; *Turner v. Miller,* 3 Butterworth's Workm. C. C. 305; *Robertson v. Hall Bros. S. Co.* 3 Butterworth's Workm. C. C. 368; *Hodgson v. West Stanley Colliery,* 102 Law Times, 194, 26 T. L. Rep. 333, 3 Butterworth's Workm. C. C. 260, overruling *Senior v. Fountains,* [1907] 2 K. B. 563, 23 T. L. Rep. 634, 9 Workm. C. C. 116; *McLean v. Moss Bay I. & S. Co.* [1910] App. Cas. 229, 3 Butterworth's Workm. C. C. 402, reversing [1909] 2 K. B. 521, 2 Butterworth's Workm. C. C. 282; *R. Legget & Sons v. Burke,* 39 Scot. Law Rep. 448; 78 Cent. Law Jour. 256; *In re Herrick,* 217 Mass. 111, 104 N. E. 432, 433; *Appeal of Hotel Bond Co.* (Conn.) 93 Atl. 245; *Pliska v. Hatton L. Co.* 1 Bulletins Ind. Comm. Wis. 95; *Dougherty v. State,* id. 99; *Dojak v. M., St. P. & S. S. M. R. Co.* 2d Ann. Rep. Ind. Comm. Wis. 47; *Julien v. Milwaukee E. R. & L. Co.* id. 65; *Wangreen v. Milwaukee E. R. & L. Co.* id. 68; *Ostrenga v. Menominee & M. L. & T. Co.* id. 77; *Mans v. Consolidated W. P. & P. Co.* id. 79; *Grendahl v. Brunet Falls Mfg. Co.* 3 id. 50; *Johnston v. Milwaukee E. R. & L. Co.* id. 68.

MARSHALL, J. Were *Mr.* and *Mrs. Ganzer,* at the time their son was injured, to any extent, dependent upon him for support? If they were, within statutory limitations, they were entitled to be compensated for their loss under par. (b), sub. (3), sec. 2394—9, Stats. 1911.

There is no presumption of dependency of parents upon

their children. Whether such condition exists in any particular case is a question of fact which the claimant must establish by the preponderance of evidence to satisfy sub. 3, sec. 2394—10, Stats. The burden in such a case should be regarded the same as in any ordinary civil action. It is not within the function of the trial body to guess at the matter, or dispose of it on any theory of favor, competency, or punishment. Nothing of that sort can legitimately enter into such a matter. Are the surviving parents losers in respect to their dependency for support by the incident of the industry in which their son was engaged at the time it happened? That is the basic question to be determined and to a reasonable certainty from competent evidence.

We must say, the evidence upon which the finding in the parents' favor in this case was made is not very satisfactory, but it is not the function of this court to try the issue as an original matter. It extends, really, no further than to determine whether there was sufficient evidence to afford jurisdiction to make the finding complained of. This very restricted opportunity for one circumstanced as appellant is for redress, should stimulate the triers of fact to exercise a high degree of diligence, impartiality, and discretion, in discovering the real facts and basing their conclusion thereon.

In this case we are unable to say that the trial body was entirely unjustified in concluding that the parents of the deceased were partially dependent on him for support. Whether, if we were to pass upon the matter from the standpoint of such body, we would come to the same conclusion it did, is quite another question. There is ample evidence that deceased was an industrious young man and inclined to deal with his parents very much as if under age; that he was fond of and freely turned over his earnings to them. The evidence indicates that he expected to be paid back some time when he needed the money to buy a farm, yet it shows that the money was not invested and kept for him, and that he did not expect

it would be. The money was used for family support and together with the other sources of income was not sufficient to create any surplus. The evidence rather indicates that there was still a deficiency, notwithstanding the fairly good earnings of the father. In face of the fact that the deceased was accustomed to turn over to his mother part of his earnings; that she spent the same for family support and, probably, as he supposed she would; that it took all thereof and the ordinary family income to meet the expenses,—we are unable to conclude the case does not fall within the statute because the son supposed that, ultimately, his parents would, in some way, make return to enable him to buy a farm.

By the Court.—The judgment is affirmed.

HEILEMAN BREWING COMPANY, Appellant, vs. INDUSTRIAL COMMISSION and another, Respondents.

April 16—May 4, 1915.

Workmen's compensation: Findings of fact, when conclusive: Cause of death.

1. An award of compensation by the industrial commission will be reversed on the ground of insufficiency of evidence only when there was no evidence tending to support it.
2. A finding by the industrial commission that the miliary tuberculosis from which an employee died on June 16, 1914, was proximately caused by an explosion of gas by which he was injured on February 7, 1914, is *held* to have been warranted by the evidence.

APPEAL from a judgment of the circuit court for Dane county: CHESTER A. FOWLER, Judge. *Affirmed.*

Petition by *Rosa Schultz,* before the *Industrial Commission of Wisconsin,* for an award of compensation, against the *Heileman Brewing Company,* for the death of her husband, F. J. Schultz, while in the employ of the *Brewing Company.*

The *Commission* made an award in favor of the petitioner and the *Brewing Company* appealed to the circuit court, which court confirmed the award of the *Commission*.

The deceased, F. J. Schultz, was employed by the *Heileman Brewing Company* of La Crosse, Wisconsin. At the time of the injury upon which is based the claim here involved, Schultz was about to engage in varnishing a so-called drum in the cellar of the *Brewing Company*. It was the custom to have the drum warm when varnished. When Schultz started work in the morning he opened the drum and undertook to light a gas jet or lamp which was used for this purpose and an explosion of gas occurred which caused first-degree burns on his face and hands and singed his eyebrows. Evidently there had been a leakage of gas into the drum during the night. This accident took place upon the 7th day of February, 1914. Immediately after being so injured a physician was called and Schultz was treated for three or four days, and after such treatments he was advised by the physician that he could return to work. His wife testifies that he complained from the time of the injury that his throat hurt him when he swallowed and for that reason he refused to drink his beer at the brewery. On March 16th he called the same physician that had treated him for the burns and complained of stomach trouble and the physician found him in a rundown condition and prescribed for him. On April 6th or 8th he called upon another physician, who diagnosed his case as one of miliary tuberculosis. At this time he was suffering from pains in his chest and he said that he had suffered ever since the explosion of the gas. He died on June 16th from miliary tuberculosis. Physicians testified that the inhalation of the gas fumes would furnish an opportunity, if the infection existed in a latent condition at the time, for the latent condition to be kindled into an active condition; and that if the infection was not existent the inhalation of gas would bring about destruction of air cells in the lungs and would lower his vi-

tality and make the person more susceptible to such infection; that the usual time for the course of miliary tuberculosis was from four to six weeks, but that it might continue for a period of three or four months. Testimony was given showing that Schultz was a seemingly strong and healthy man before the injury here complained of, except for a little foot trouble sometime in the past.

The *Industrial Commission of Wisconsin,* after hearing the testimony, found "that the miliary tuberculosis from which deceased died was proximately caused by the accidental explosion of gas . . . while the deceased was in the performance of his duties," and awarded compensation to the defendant *Rosa Schultz* amounting to $3,000, to be paid in monthly instalments.

Upon appeal to the circuit court the award of the *Commission* was affirmed and judgment entered accordingly. This is an appeal from such judgment.

Robert R. Freeman, attorney, and *Timothy Brown,* of counsel, for the appellant.

For the respondent *Industrial Commission* there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

For the respondent *Rosa Schultz* there was a brief by *W. F. & A. C. Wolfe,* and oral argument by *A. C. Wolfe.*

SIEBECKER, J. The judgment must be affirmed. Giving the weight to the award of the *Industrial Commission* required by the law (*Milwaukee W. F. Co. v. Industrial Comm.* 159 Wis. 635, 150 N. W. 998; *Milwaukee v. Industrial Comm.* 160 Wis. 238, 151 N. W. 247), the circuit court properly affirmed it. Under the law the court can reverse an award on the ground of insufficiency of evidence, only when there is no evidence before the *Commission* tending to support it. The evidence of *Mrs. Schultz* and other witnesses, of decedent's condition of health after injury, the fact of his

state of health before injury, in connection with the opinion evidence of doctors qualified to speak on the subject, furnishes a sufficient basis of fact to warrant the commissioners' conclusion that miliary tuberculosis from which decedent died was proximately caused by the gas explosion.

By the Court.—Judgment affirmed.

OGDEN, Respondent, vs. BRADSHAW, Appellant.

December 11, 1914—May 18, 1915.

Mortgages: Foreclosure: Judgment: Form: Deficiency: Limitation of actions: Covenant to pay in mortgage: Taxes paid: Interest: Maximum rate recoverable.

1. Where a mortgage securing a note contains a covenant to pay the amount named in the note, specifying it, the circuit court has jurisdiction, upon a complaint asking such relief, to render a personal judgment for damages upon such covenant and a judgment for foreclosure of the mortgage without provision for a deficiency judgment; and, in the absence of any objection at the trial or any request for an ordinary foreclosure judgment, defendant cannot afterwards complain that the judgment so rendered does not conform strictly to the foreclosure statute.
2. Where a mortgage under seal contains a covenant to pay the debt secured thereby, neither the right to foreclose nor the right to a personal judgment for deficiency is barred until the expiration of twenty years from the time of default.
3. Where the mortgage contains also a covenant by the mortgagor to pay taxes, damages for breach of such covenant may be added to the amount found due.
4. The covenant in this case being to pay the sum specified in the note "with interest accruing thereon at the times and in the manner stated in said note," the note, though barred, may be taken to fix the terms of interest on the amount secured by the lien.
5. Even though a note expressly provides for the compounding of interest, the maximum recovery for interest thereon must not, under sec. 1689, Stats., exceed ten per cent. per annum simple interest.

APPEAL from a judgment of the circuit court for Douglas county: FRANK A. ROSS, Circuit Judge. *Affirmed.*

The judgment provides, among other things, that plaintiff recover upon the first cause of action stated in the complaint the sum of $6,546.36 damages and $46.31 costs and disbursements, in all the sum of $6,592.67, and that plaintiff have execution therefor and all other remedies usual upon personal judgments; that there is due plaintiff upon the note and secured by the mortgage for principal, interest, and taxes paid, the sum of $6,546.36 principal, the further sum of $78.81 costs, and the further sum of $50 attorneys' fees, in all the sum of $6,675.17, which sum is a lien upon the mortgaged premises; that the mortgaged premises be sold at any time after one year from the date of the judgment, unless redeemed previous to such sale by payment of the amount so adjudged to be due with interest at six per cent. per annum and subsequent costs; that any sum or sums collected upon the judgment entered against the defendant personally upon the first cause of action shall be applied toward the payment and discharge of this judgment of foreclosure and sale.

For the appellant there was a brief by *Grace, Hudnall & Fridley,* and oral argument by *George B. Hudnall.* They contended, *inter alia,* that plaintiff was not entitled to "interest at ten per cent. per annum on said principal and on all payments of interest after they severally mature until paid," as called for in the note. Defendant did not, in the mortgage, covenant to pay the note according to its terms; in fact he did not agree to pay the note at all. He simply agreed to pay "the sum of money above specified with interest accruing thereon." The sum of money above specified with interest accruing thereon was $1,650, with interest at eight per cent. These sums he agreed to pay "at the times and in the manner stated in said note." The time stated in the note is five years after the date of the note. The manner stated in the note is "gold coin payable at the State Bank, Madison, Wis." The

statute of limitations having run on the note, the note is as effectually out of the case "as if paid or otherwise discharged." *Eingartner v. Ill. S. Co.* 103 Wis. 373, 376, 79 N. W. 433. Not having paid the agreed sums at the time agreed—October 9, 1900,—defendant thereby breached the covenant in the mortgage, and for such breach, the amount being liquidated, plaintiff was entitled to six per cent. interest from the time of the breach.

For the respondent there was a brief by *Luse, Powell & Luse,* and oral argument by *L. K. Luse.* They argued, among other things, that the judgment was not rendered for a larger amount than was due upon a proper computation of interest. The promise in the mortgage, by referring to the note, is just as complete as if the note was incorporated bodily in and as a part of the covenant. *Elmore v. Higgins,* 20 Iowa, 250; *Lake View v. MacRitchie,* 134 Ill. 203, 25 N. E. 663; 9 Cyc. 582; *Miller v. Edgerton,* 38 Kan. 36, 15 Pac. 894; *Short v. Van Dyke,* 50 Minn. 286, 52 N. W. 643; 1 Jones, Mortg. (6th ed.) § 71; *Norton v. Kearney,* 10 Wis. 443; *Wright v. C. S. Graves L. Co.* 100 Wis. 269, 75 N. W. 100.

The following opinion was filed January 12, 1915:

TIMLIN, J. The plaintiff in his complaint set forth two separate causes of action, the first at law for damages on a note and on a covenant of payment thereof found in the mortgage and on a breach of the covenant to pay taxes contained in the mortgage; the second cause of action was the ordinary complaint for foreclosure of a mortgage and sale of the mortgaged premises, not, however, seeking judgment for deficiency. No objection was made to the form of the complaint by demurrer, motion, or otherwise, but the defendant made answer to the merits and went to trial on such pleadings. There was not even a request made to the circuit court that the ordinary judgment of foreclosure and sale should be rendered. No exception to the form of the judgment was taken,

and exceptions to the findings of fact and conclusions of law were not made until thirty days after judgment and do not cover this point. The appellant now seeks to raise for the first time in this court the question whether the ordinary judgment of foreclosure and sale should not have been given. This cannot be done. The judgment given follows the pleading. The jurisdiction of the court to render a judgment for damages or its jurisdiction to foreclose a mortgage without making provision for a deficiency judgment are unimpaired. Each pertains to the general common-law and equity jurisdiction derived by the circuit court from the constitution. If it be said that all foreclosure actions must proceed under this statute, the answer is that tacit consent, by failure to take any exception to the proceeding or make any request for such judgment, waives all objection except that the court lacked jurisdiction or that the complaint states no cause of action. Sec. 2654, Stats. 1913. Neither of the two latter objections is made or can be made in the instant case. The plaintiff could have brought separate actions to achieve what he has here done in one action, and it is no serious invasion of defendant's rights that the result was accomplished in one action instead of two. Perhaps this is why the defendant did not ask for any other judgment. For the law where objection is taken, see *Jesup v. City Bank,* 14 Wis. 331; *Endress v. Shove,* 110 Wis. 133, 85 N. W. 653.

The appellant contends that the judgment for damages is unwarranted because an action on the note was barred by the six years' statute of limitations. This is true, but the mortgage, which is under seal, contains the following covenant:

"And the said party of the first part, for himself and his heirs, executors, administrators and assigns, hereby covenants and agrees to and with the said party of the second part, his heirs, executors, administrators and assigns, as follows, to wit: that he will pay to the said party of the second part, his heirs, executors, administrators and assigns, the sum of money above specified with interest accruing thereon at the

times and in the manner stated in said note, together with all costs and expenses, if any there be."

The sum of $1,650 was previously specified in the mortgage. There is no legal necessity that a bond or note exist as collateral to the mortgage. The covenant to pay a specified sum may be contained in such collateral instrument or in the mortgage itself. There may be two promises, one in the note and another in the mortgage; one on simple contract and the other a covenant under seal. 1 Jones, Mortg. (6th ed.) § 72; 2 id. § 1225.

It has been held that judgments for damages against the mortgagor may be had upon his covenant contained in the mortgage to pay the taxes on the mortgaged property. *Endress v. Shove,* 110 Wis. 133, 85 N. W. 653. It has also been ruled in numerous cases in this state that after the statute of limitations has run against the simple contract debt evidenced by promissory note to which the mortgage is collateral, the mortgage, being an instrument under seal, may be foreclosed within twenty years after default on the note; but no judgment for deficiency can be given against the mortgagor in such case. *Wiswell v. Baxter,* 20 Wis. 680; *Knox v. Galligan,* 21 Wis. 470; *Whipple v. Barnes,* 21 Wis. 327; *Duecker v. Goeres,* 104 Wis. 29, 80 N. W. 91; *Wells v. Scanlan,* 124 Wis. 229, 102 N. W. 571. It would seem to follow that where the covenant to pay is found in the mortgage and the mortgage is a sealed instrument, not only the right to foreclose but the right to a personal judgment for deficiency would run twenty years from the time of default.

We conclude that, the covenant to pay being under seal, the right to a judgment for deficiency was not barred, and on the authority of *Endress v. Shove, supra,* that there was properly added to the amount due on the note the amount which the mortgagee was obliged to pay for taxes delinquent by default of the mortgagor, there being an express covenant on the part of the latter to pay these taxes. The agreement covered by

the note and mortgage was to pay $1,650 five years after October 9, 1895, with interest until paid at the rate of eight per cent. per annum payable semi-annually, and with interest at ten per cent. per annum on the principal and on all payments of interest after they severally mature until paid. The court by its judgment allowed the plaintiff for principal and interest due on the note and mortgage up to the time of judgment $4,358.26. This meant an allowance of $2,708.26 for interest. This appears to be in line with the contract of the parties and does not exceed the maximum of ten per cent. per annum simple interest permitted by sec. 1689, Stats. 1913.

By the Court.—The judgment of the circuit court is affirmed.

A motion by the appellant for a rehearing was denied May 18, 1915, and the following opinion was filed:

PER CURIAM. In the motion of appellant for a rehearing our attention is called to an error of fact in the opinion relative to the amount allowed for interest in the judgment appealed from. That amount was stated to be $2,708.26, but this took no account of several interest payments which had been made and which amounted to $485.74, consequently the true amount was $182.75 in excess of $3,611.25, the latter sum being ten per cent. per annum simple interest on the principal for eighteen years and three months.

The appellant makes two points upon rehearing: *First,* that the judgment should be modified by reducing the interest to eight per cent. simple interest for the whole time, because notwithstanding the provisions of the note calling for a computation of interest upon interest instalments in arrears this covenant was not repeated in the mortgage and suit on the note was barred by the statute of limitations. This point is overruled because the note, although barred, yet may be taken

to fix the terms of interest on the amount secured by the lien. *Potter v. Stransky,* 48 Wis. 235, 4 N. W. 95, and cases cited. *Second,* that the judgment should be modified by reducing as of the date of the judgment the amount of interest awarded by $182.75. This point is sustained. Sec. 1689, Stats. 1913.

Quite similar statutes have received this construction in *Mathews v. Toogood,* 25 Neb. 99, 41 N. W. 130; *Brown v. Crow* (Tex.) 29 S. W. 653; *Kimbrough v. Lukins,* 70 Ind. 373; *Smith v. Parsons,* 55 Minn. 520, 57 N. W. 311; *Columbia Co. Comm'rs v. King,* 13 Fla. 451.

The motion for rehearing is granted to the extent of modifying the former judgment, as indicated in the opinion, with $25 costs of the motion to be taxed in favor of the appellant. In all other respects the motion for rehearing is denied. The mandate in the case is amended so as to read as follows: Judgment modified by deducting therefrom, as of its date, the sum of $182.75, and as so modified affirmed, with costs in favor of the respondent.

FANDEK, Executor, Respondent, vs. BARNETT & RECORD COMPANY and another, Appellants.

January 14—May 18, 1915.

Master and servant: Injuries: Defenses: Statutes: Assumption of risk and contributory negligence distinguished: Duty of employees: Questions for jury: Form of special verdict.

1. The correct practice is to submit for special verdict only one question on the subject of plaintiff's contributory negligence; but the submission of two questions partly covering the field and one wholly covering it, where the answers are consistent, was not a prejudicial error.
2. Contributory negligence is established when it is shown that plaintiff failed to take such precautions for his own safety as a person of ordinary care and prudence would usually take under the same or similar circumstances.

3. The defense of assumption of risk which was abolished by sub. (1), sec. 2394—1, Stats. 1911, in actions for personal injuries to employees, relates to such risks as could be assumed within the field of ordinary care; but if an employee, either knowingly or ignorantly through a want of ordinary care, serves under a risk when the imminence of serious injury therefrom is so great that an ordinarily careful and prudent man similarly situated would not usually serve under it, his conduct is contributory negligence, and the defense based thereon remained available to the employer under the statute of 1911, although afterwards abolished in certain cases by par. (3), sub. 1, sec. 2394—1, Stats. 1913. *Besnys v. Herman Zohrlaut L. Co.* 157 Wis. 203, explained and limited.
4. The abolition of the defense of assumption of risk does not absolve the employee from the duty of exercising ordinary care for his safety; and whenever his failure to do that causes his injury in whole or in part he is guilty of contributory negligence, irrespective of whether the negligence consists in an omission to discover a danger that ought to be discovered and shunned, or in a careless or bungling manner of doing an act otherwise reasonably safe, or in voluntarily assuming a risk that an ordinarily careful and prudent man similarly situated would not usually assume.
5. No sharp distinction always exists between contributory negligence and mere assumption of risk, and it is in most cases for the jury to say whether the conduct in question is one or the other.
6. Large, heavy steel spouts from an ore dock had been unloaded from cars and piled in tiers of three, timbers being laid across or at an angle in the lower spouts to support the upper ones and to prevent them from nesting together. In the performance of his duty one of the unloading crew proceeded to remove various plates, burrs, and washers which had been left in the spouts. After removing them from the top spout of one tier he crawled into the middle spout and while removing a plate the top spout suddenly fell and crushed him. The top spout had been supported at one corner by the upper edge of the middle spout only. The jury found that deceased before climbing into the middle spout could by the exercise of ordinary care have learned the manner in which the top spout was then supported and have comprehended the danger of its falling upon him, and that a want of ordinary care on his part proximately contributed to his injury. *Held*, that the jury thereby found him guilty of contributory negligence and not of assumption of risk.

SIEBECKER and KERWIN, JJ., dissent. MARSHALL, J., dissents in part.

APPEAL from a judgment of the circuit court for Ashland county: G. N. RISJORD, Circuit Judge. *Reversed.*

Action for personal injury originally begun by Ernest Samida to recover damages for injuries sustained by him on January 21, 1913, while employed by the defendant in unloading and piling spouts belonging to an ore dock that was being repaired. On March 8, 1913, Samida died as a result of his injuries and the action was thereafter revived in the name of plaintiff as executor of the will of Samida.

The spouts which the deceased assisted in unloading were about thirty feet long, two feet deep, four feet wide at the smaller end, and eleven feet wide at the larger end. At the large end they were practically flat on the bottom and at the smaller end they were somewhat circular. Each spout weighed about two tons. On the under side there were, at intervals, ribs of steel about one-half inch thick and four inches wide set edgewise onto the spouts. These spouts were being removed from the dock and piled in the ore yard while repairs were being made on the dock. They were loaded onto flat cars at the dock in sets of two in height with timbers placed across the ends or laid in the spout at an angle from the side to prevent them from nesting together. Various plates, burrs, and washers that were used in attaching them to the dock were left in them. In the ore yard four spouts were first laid upon the ground side by side and adjacent to the track. Then by means of skids and block and tackle each set of two spouts was slid from the flat car onto the spouts already placed, so that a pile when completed consisted of four tiers each three spouts in height. After the spouts were piled and while waiting for the next car the crew were required to climb and crawl into the spouts and remove the plates, burrs, and washers left in them. The plates were about three feet by three and one-half feet and weighed about 150 pounds each.

Just before the dinner hour on January 21, 1913, the crew

had completed three of these tiers, and the tenth spout was on the ground ready for two more spouts to be placed, completing the pile. The top spout in the tier last placed was supported by a timber across the small end. At the large end there was a 4 x 4 inch timber set diagonally in the spout on the left-hand side when looking toward the small end, and on the other side the spout rested on the one below, the point of contact being the first rib at about one or one and one-half inches from where the rib turned up the side of the spout.

Upon returning from dinner Samida removed the plates and washers from the first two tiers, and then climbed into the top spout last placed and removed the plates, burrs, and washers and then crawled into the middle spout of the same tier. He had removed one plate and was pushing on the second when his partner, Becker, came along and asked if he wanted help. Becker took hold of the front end of the plate and was pulling when the upper spout fell and crushed Samida.

The jury found (1) that the spout that injured Samida was not so supported at the time of the injury as to give reasonable protection to the life and limb of a person employed as Samida was at the time of the accident; (2) that such failure to have the spout so supported was the proximate cause of the injuries to the deceased; (3) that the defendants in the exercise of ordinary care ought to have anticipated before the injury occurred that the spout was not so supported as to give reasonable protection to the life and limb of a person engaged as deceased was at the time of the injury; (4) that the deceased before climbing into the spout in which he was injured could by the exercise of ordinary care have learned the manner in which the top spout was then supported; (5) that the deceased before climbing into the spout in which he was injured could by the exercise of ordinary care have comprehended the danger of the spout falling upon him; (6) that a want of ordinary care on the part of Samida proximately con-

tributed to his injuries; (7) that the defendants did not furnish Samida, at the time he was injured, a place of employment in which to perform his duties as free from danger to life, health, and safety of the employees engaged in the employment that Samida was at the time of the injury as the nature of the employment reasonably permitted; (8) that the failure of defendants to furnish such place of employment was the proximate cause of the injuries to the deceased; and (9) damages $1,366.25.

The court changed the answer to question 6 from "Yes" to "No." Upon the verdict so changed judgment was entered for plaintiff and the defendants appealed.

For the appellants there was a brief by *Bundy & Wilcox,* and oral argument by *R. L. Wilcox.*

For the respondent the cause was submitted on the brief of *Holland & Lovett,* attorneys, and *W. Stanley Smith,* of counsel.

The following opinion was filed March 2, 1915:

VINJE, J. The trial court changed the answer to question 6 from "Yes" to "No" and exonerated the deceased from contributory negligence on the ground that his conduct did not amount to contributory negligence but to an assumption of risk only. In his opinion the judge says:

"The evidence in this case bearing upon the conduct of the deceased resolves itself into the question of whether going into the spout to get the plates out, knowing and appreciating as he did how the upper spout was being supported, was an act of negligence on his part contributing to his injury, or conduct which, except for the statute, would have constituted an assumption of risk."

We presume the latter part of the sentence means, conduct which, except for the statute, would have constituted the defense of assumption of risk, since obviously the statute could not abolish assumption of risk. It abolished the defense of

assumption of risk and left the defense of contributory negligence. Sub. (1), sec. 2394—1, Stats. 1911. By so doing the legislature clearly recognized that there was a distinction between assumption of risk and contributory negligence or it would not have abolished the defense as to one and not as to the other. In 1913 the defense of contributory negligence was abolished as to employers having four or more employees engaged in a common employment at the time of the accident. Par. (3), sub. 1, sec. 2394—1, Stats. 1913. The provision abolishing the defense of assumption of risk remains unchanged (see par. (1), sub. 1, sec. 2394—1, Stats. 1913), again showing that the legislature recognized the distinction between contributory negligence and assumption of risk. This court has frequently, and especially of late, had occasion to state in various phraseology the fact that assumption of risk and contributory negligence may co-exist, or one may be present and the other absent. See *Campshure v. Standard Mfg. Co.* 137 Wis. 155, 118 N. W. 633; *Dodge v. Kaufman,* 152 Wis. 171, 139 N. W. 741; *Van Dinter v. Worden-Allen Co.* 153 Wis. 533, 138 N. W. 1016, 142 N. W. 122; *Murray v. Paine L. Co.* 155 Wis. 409, 144 N. W. 982; *Janiak v. Milwaukee Western F. Co.* 156 Wis. 544, 146 N. W. 788; *Jahn v. Northwestern L. Co.* 157 Wis. 195, 146 N. W. 1131.

By its answer to question 4 the jury found that by the exercise of ordinary care the deceased before climbing into the spout could have learned the manner in which the top spout was supported, and by its answer to question 5 it found that by the exercise of like care he could have comprehended the danger. Both these questions relate to contributory negligence. The claim of counsel for plaintiff that they relate to assumption of risk is unfounded, for the court as well as counsel clearly understood that assumption of risk was not a defense and that no questions on that branch of the case were needed or permissible. The answers to the two questions became practically immaterial by reason of the fact that ques-

tion 6 itself covers the whole field of contributory negligence. They only serve to emphasize the fact that no matter in what form the issue of contributory negligence was presented the jury found against plaintiff.

The correct practice, however, is to submit only one question on the subject of plaintiff's contributory negligence, but the submission of two partly covering the field and one wholly so, where the answers are consistent, cannot be held prejudicial error.

Question 6 read, "Did any want of ordinary care on the part of Ernest Samida proximately contribute to produce his injuries?" Relative to it the court charged the jury as follows:

"You are instructed that it was plaintiff's duty to exercise ordinary care for his own safety, and that the exercise of such care includes the fair use of one's faculties and opportunities of observation in order to learn and comprehend the dangers that are naturally incident to the situation. The deceased, Ernest Samida, is chargeable with the knowledge of such danger as he might know or comprehend by the exercise of such ordinary care, and such as he could have discovered and ought to have discovered by the use of his sight and other senses in the exercise of such care. You will carefully consider the evidence in this case bearing upon the inquiry as to whether Samida's own conduct at the time of the injury lacked the exercise of ordinary care,—that is, whether or not he himself was negligent in the manner in which he attempted to take the plates out of the chute, *and whether he was negligent in going into the chute at all to take the plates out under the conditions then surrounding him,* and whether he was negligent in any way that contributed proximately to produce his injury; and in considering this question you will also bear in mind the explanation and definition I gave you of the terms 'proximate' in connection with 'proximate cause.'

"You are instructed that knowledge by the deceased that the spout was not properly supported, if you find that to be a fact, and his continuance in the employment of the defendants up to the time of his injury, that such knowledge is not of it-

self evidence of a want of ordinary care on his part; but you will determine whether the deceased exercised ordinary care under the circumstances, under the instructions I have given you, in going into the spout in question at the time, in the light of the situation as it then was, and in the light of his duties to exercise ordinary care for his own safety, and answer this question 'Yes' or 'No' as you find the facts to be; and you are instructed that the burden is upon the defendants to satisfy you by a preponderance of the evidence that the deceased failed to exercise ordinary care,—that is, that your answer to this question should be 'Yes,' and you are instructed that if you are not so satisfied your answer to this question will be 'No.' "

The question is the usual one submitted upon the issue of contributory negligence, and the instructions relative to it are also such as are customarily given under similar circumstances. The jury is asked to measure the conduct of the deceased by that of an ordinarily careful and prudent man under the same or similar circumstances, and they are told that if it measures up to such conduct they must answer the question "No," otherwise "Yes." It is difficult to perceive how the jury could have regarded the question, under the charge given, as calling for the determination of any other fact than that of whether the conduct of the deceased at the time he was injured measured up to ordinary care. Indeed, the trial court does not change the answer to the question on the ground that the jury was misled in any way, but because the conduct of the deceased, as shown by the evidence, establishes as a matter of law assumption of risk and not contributory negligence.

The testimony on this branch of the case is practically undisputed. The evidence shows that when the crew went to dinner the top spout rested upon the one below it as described in the statement of facts and it was in the same position when they returned after dinner. The witness Zasada so testifies and it is not disputed. The deceased went to work and took out the plates and washers in the two tiers first piled and then

went into the top spout of the tier just completed before dinner and removed the plates and washers from it. He then climbed down and crawled into the one below it, and it was while he was in the act of removing the plates and washers from the second spout from the top that the upper one suddenly fell upon him. It fell like a shot, the witnesses say, without any grating noise as though slipping upon its bearings. The deceased, whose testimony was taken, says he did not look at or examine how the upper spout was supported before he crawled into the one below it, though he could have easily done so had he taken just a glance at it, as it was resting about level with his eyes.

The workmen were here creating a place of employment by the piling up of these spouts. Its safety depended largely upon the care exercised by them in doing their work. It was quite evident to any of them that a spout like the one in question unless securely supported would constitute a deadly trap for any one in the spout below, as the least jar or disturbance might cause it to fall. It was no doubt owing to this fact that the jury found the deceased negligent in crawling into the second spout without looking to see how the upper one was supported—especially since he had just been up into it and had taken plates and washers from it. He testifies that he did not jar it in so doing, neither did he do so when he was in the one below and the upper one fell. In this he is corroborated by Becker, who worked with him at the time he was injured. He said neither he nor the deceased disturbed the upper spout. So the jury must have found that the upper spout, at the time the deceased crawled under it, was so insecurely supported that an ordinary inspection would have disclosed the fact, and that being chargeable with the knowledge of such fact it was negligence to crawl into the spout below as the deceased did.

This brings us to the question whether contributory negligence can consist in serving under a risk that is known to the

employee or which by the exercise of ordinary care he should have discovered, or whether such service is in all cases nothing more than an assumption of risk.

Contributory negligence is established when it is shown that plaintiff failed to take such precautions for his own safety as a person of ordinary care would usually take under the same or similar circumstances. It may take the form of an affirmative act or of a failure to act. It may consist in an act or in a failure to act that creates a new risk or that enhances or assumes an existing one. If plaintiff serves under hazards incident to the employment no greater than those which ordinarily careful and prudent men usually serve under, then injury from such hazard alone is through assumption of risk and not through contributory negligence. But if plaintiff knowingly or ignorantly through a want of ordinary care serves under a risk that an ordinarily careful and prudent man similarly situated would not usually serve under, then such conduct is contributory negligence and not assumption of risk. In other words, the assuming of such risks as ordinarily careful and prudent men similarly situated usually assume is within the field of assumption of risk whether assumed knowingly or ignorantly. But the assuming of such risks as are more hazardous than those which ordinarily careful and prudent men similarly situated usually assume constitutes contributory negligence. And it is immaterial whether the risk is assumed knowingly or ignorantly through a want of ordinary care. It was no doubt with this idea in mind that the supreme court of the United States in *Schlemmer v. B., R. & P. R. Co.* 205 U. S. 1, 12, 27 Sup. Ct. 407, speaking of assumption of risk and contributory negligence, said: "But the difference between the two is one of degree rather than of kind." In that case upon the second appeal (220 U. S. 590, 31 Sup. Ct. 561) it was held that the going in between cars by a brakeman to couple them was not so hazardous as to be *per se* contributory negligence; that

his going in was merely an assumption of risk; but the finding of the state court that plaintiff was guilty of contributory negligence in the manner in which he attempted to make the coupling after he was in between the cars was sustained. After defining assumption of risk and excepting therefrom "such obvious dangers that no ordinarily prudent person would incur them," the court says: "Contributory negligence, on the other hand, is the omission of the employee to use those precautions for his own safety which ordinary prudence requires." Page 596.

And in *Seaboard A. L. R. Co. v. Horton,* 233 U. S. 493, 504, 34 Sup. Ct. 635, it used this language:

"Contributory negligence involves the notion of some fault or breach of duty on the part of the employee, and since it is ordinarily his duty to take some precaution for his own safety when engaged in a hazardous occupation, contributory negligence is sometimes defined as a failure to use such care for his safety as ordinarily prudent employees in similar circumstances would use. On the other hand, the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employee."

As long as the employee was solely responsible for the results of an assumption of risk it was not necessary to distinguish between those cases in which he was defeated by assumption of risk and those in which contributory negligence barred his recovery. With this idea in mind the court in *Knauer v. Joseph Schlitz B. Co.* 159 Wis. 7, 149 N. W. 494, speaking of assumption of risk, said:

"Being purely a voluntary act, it does not involve any violation of duty by the employee, for one is at liberty to subject himself to danger if he sees fit, and, if he does so, in the absence of some written law to the contrary, it is at his own risk."

But when the act of an employee who subjects himself to a hazard is at the expense of the employer, a duty upon his

part arises not to unnecessarily assume a risk so great that an accident may reasonably be expected to follow. To do so is negligence, because it is failing to take that precaution for his own safety that ordinarily prudent employees usually take under similar circumstances.

The abolition of the defense of assumption of risk does not absolve the employee from the duty of exercising ordinary care for his own safety. And whenever his failure to do that causes his injury in whole or in part he is guilty of contributory negligence, irrespective of whether the negligence consists in an omission to discover a danger that ought to be discovered and shunned, or in a careless or bungling manner of doing an act otherwise reasonably safe, or in voluntarily assuming a risk that an ordinarily careful and prudent man similarly situated would not usually assume. Negligence exists when conduct does not measure up to the standard of ordinary care. The defense of assumption of risk abolished by the statute related to such risks as could be assumed within the field of ordinary care. When their assumption amounted to negligence the defense under the law in force when this injury occurred was available. There is no other rational line of demarcation.

Since ordinarily careful and prudent men usually serve under ordinary risks, it follows that in order to constitute contributory negligence the risk voluntarily served under must be more or less imminent or grave in its nature. It must be a hazard that suggests danger to such an extent that a person of ordinary care would not usually serve under it. *Goltz v. M., L. S. & W. R. Co.* 76 Wis. 136, 44 N. W. 752; *Erdman v. Ill. S. Co.* 95 Wis. 6, 69 N. W. 993. Nothing herein said conflicts with what was decided in *Besnys v. Herman Zohrlaut L. Co.* 157 Wis. 203, 147 N. W. 37, where the court held that it was the legislative intent as expressed in secs. 2394—48, 2394—49, Stats. 1911, to impose upon the employer a liability for all injuries resulting from the haz-

ards incident to the methods, processes, and conditions of the business furnished, permitted, or suffered by him, however obvious such hazards might be to the employee. Obvious means "Easily discovered, seen, or understood; readily perceived by the eye or the intellect; evident; as, an obvious meaning; an obvious remark; an obvious defect." Webster, Internat. Dict. So obvious risks or dangers of an employment are those which are apparent in the exercise of ordinary observation and which are disclosed by the ordinary use of the eyes and other senses. 6 Words & Phrases, 4896 and cases cited. It is not the ease with which a hazard is discovered that tends to make serving under it a want of ordinary care, but the imminence of serious injury from it. And when such imminence of serious injury is so great that an ordinarily prudent man would not under the same or similar circumstances serve under it, the voluntary doing so constitutes contributory negligence. The question in the *Besnys Case* was whether the risk assumed was so great as to constitute contributory negligence as a matter of law. The majority of the court held that it was not. Our court has frequently spoken of assumption of risk as a species of contributory negligence, and so it is in many if not in all cases. As long as both were a complete defense no occasion arose for making a sharp distinction between them. Indeed, no sharp distinction always exists, for negligent and nonnegligent acts shade into each other and the judgment of men differs as to when they pass from one field into the other. So it is in most cases primarily a question for the jury to say in what field the questioned conduct lies, in that of a mere assumption of risk or in that of negligence, bearing in mind, however, that it may enter the latter field through the former as well as otherwise.

Under the evidence, the answer to the question submitted, and the instructions relative thereto, it must be held that the jury found the deceased guilty of contributory negligence

and not of assumption of risk, and that there is evidence to sustain the finding. The trial court, therefore, erroneously changed the answer to question 6 (numbered 7 in the verdict rendered) from "Yes" to "No."

By the Court.—Judgment reversed, and cause remanded with directions to reinstate the specified answer of the jury and to enter judgment for defendant upon the verdict as rendered.

SIEBECKER, J. (*dissenting*). I cannot concur in the decision rendered by the court that Samida was guilty of contributory negligence. It seems clear to me that the trial court correctly held that he was free from contributory negligence under the facts and circumstances shown. The risk and danger incident to the unsafe manner in which the spout was placed by the members of the crew doing this work and which the jury found proximately caused the injury was a danger incident to the manner in which defendant conducted its business at the place in which Samida was permitted to work. Under the facts shown it was a risk he, as defendant's employee, had the right to assume. To my mind there is nothing in the evidence to warrant the inference that he was guilty of negligence in performing his service under this hazard incident to his employment. The court holds that ". . . if plaintiff knowingly or ignorantly through a want of ordinary care serves under a risk that an ordinarily careful and prudent man similarly situated would not usually serve under, then such conduct is contributory negligence and not assumption of risk." And: "But the assuming of such risks as are more hazardous than those which ordinarily careful and prudent men similarly situated usually assume constitutes contributory negligence." I think this basis of the decision is contrary to the provision of sec. 2394–41, Stats. 1913, and subsequent sections defining the liability of employers to employees while in their service and

as interpreted in the decisions of this court. See *Rosholt v. Worden-Allen Co.* 155 Wis. 168, 144 N. W. 650; *Besnys v. Herman Zohrlaut L. Co.* 157 Wis. 203, 147 N. W. 37; *Knauer v. Joseph Schlitz B. Co.* 159 Wis. 7, 149 N. W. 494.

In the *Besnys Case* the court declares:

"The legislature intended that employers should be liable for all injuries resulting to employees from unsafety in employment as regards to places, safety devices, and safeguards, and to methods and processes of conducting their business. The clear implications are that the risks and hazards of an employment resulting from a failure of the master to comply with these requirements are risks and hazards incident to the employee's duties, though they may be of an obvious nature."

Van Dinter v. Worden-Allen Co. 153 Wis. 533, 138 N. W. 1016, 142 N. W. 122; *Puza v. C. Hennecke Co.* 158 Wis. 482, 149 N. W. 223.

I think the rule followed in the instant case as above stated is at variance with the rule of the *Knauer* and other cases as to what constitutes assumption of risk and contributory negligence under these statutes. Under the evidence the court, in my opinion, properly awarded judgment for the plaintiff.

KERWIN, J., dissents.

The following opinion was filed March 19, 1915:

MARSHALL, J. (*concurring*). I concur in the decision upon the ground that, though the deceased assumed the risk of working under conditions which were more than ordinarily hazardous, he was guilty of contributory negligence in failing to exercise ordinary care to see whether the spouts were securely supported before going into the particular place where he was injured. According to the statement of facts, the spouts were liable to be insecurely supported as deceased must have known. The risk that they might be thus was the one he assumed. That was within his contract. It did not

absolve him from responsibility of paying reasonable heed to whether they were in such condition before going into the probable zone of danger. According to the statement, just a little attention to the matter would have disclosed the imminence of such danger. He paid no attention whatever thereto and so was guilty of contributory negligence.

The last part of the opinion of my brother VINJE, stating a distinction between contributory negligence and assumption of the risk under the statutory policy rendering the former still a matter of defense, but the latter not, I cannot agree to. I do not think it is supported by *Erdman v. Ill. S. Co.* 95 Wis. 6, 69 N. W. 993; *Schlemmer v. B., R. & P. R. Co.* 205 U. S. 1, 27 Sup. Ct. 407; or *Besnys v. Herman Zohrlaut L. Co.* 157 Wis. 203, 147 N. W. 37.

The first case cited distinctly treats voluntarily working under extrahazardous conditions as assumption of the risk, and the others recognize that there may be assumption of risk of a high degree and failure to exercise ordinary care under the special circumstances. The idea that the grade of danger is a test of whether the particular risk is assumed, or the act in working under the conditions or in the particular way, an inadvertence,—is a new one and I fear an illogical and dangerous one.

It is unfortunate that assumption of the risk, which, necessarily, does not involve inadvertence, was ever confused with contributory negligence, which, necessarily, must be characterized by inadvertence. It is still more unfortunate, in my view, that after distinctly and emphatically turning to the only logical distinction between the two situations in *Knauer v. Joseph Schlitz B. Co.* 159 Wis. 7, 149 N. W. 494, the new idea should be advanced. At present, it has the support of but a minority of the court. I have faith that, upon further consideration, the distinction mentioned in the *Knauer Case* will be affirmed as the only one and that it will also be reaffirmed, as in *Besnys v. Herman Zohrlaut L. Co.* and the

Schlemmer Case, that if one voluntarily consents to work in an extra and unnecessarily hazardous place, he assumes the risk regardless of the grade of it, but if he then fails to exercise reasonable care, under the special circumstances, his conduct is not within the field of such risk but is within that of inadvertence. That does not inject any new and confusing idea into the law of negligence as regulated by the statute, while the idea that I feel compelled to dissent from, I think does.

A motion for a rehearing was denied, with $25 costs, on May 18, 1915.

WOOD, Respondent, vs. GENERAL RAILWAY SIGNAL COMPANY, Appellant.

February 9—May 18, 1915.

Master and servant: Injuries: Collision between motor car and railway train: Safety of working place: Negligence: Contributory negligence: Pleading: Liberal construction: Amendment at trial: Continuance.

1. Where an employee of a railway signal company, riding on a motor car upon the tracks of a railway company, was injured by a collision between such car and the rear end of a railway train in a tunnel, the safe-place rule prescribed by sub. (11), sec. 2394—41, and sec. 2394—48, Stats., has no application as against the signal company, which had nothing to do with the operation of the train or the patroling of the track or tunnel and omitted no duty in regard to making the place of employment less dangerous than it was.
2. Trial courts have a broad discretion in the matter of granting continuances where pleadings are amended at the trial; but a plaintiff should not be permitted to plead one cause of action and then prove a different one and amend his complaint accordingly, without proper opportunity being given to defendant to prepare for trial on the new issue.

3. Pleadings, however, must be liberally construed, and proof is admissible under pretty broad general allegations, the remedy of the opposite party in such a case being to move to make the pleading more definite and certain.
4. In an action for injuries sustained by an employee of a railway signal company in a collision between the motor car upon which he was riding and the rear end of a railway train which the car had followed into a tunnel 900 feet long, in which the smoke was so dense that it was impossible to see objects after entering it, an allegation that another employee in charge of the motor car was negligent in running it too fast and too close to the train and in failing to check and stop it in time to avoid the collision, was broad enough to justify the admission of evidence that such other employee was negligent in not stopping the car before entering the tunnel, so as to ascertain whether or not the way was clear.
5. The evidence in such case is *held* to sustain findings by the jury that the employee in charge of the car was negligent in driving it into and through the tunnel until it collided with the train, and that plaintiff, who was subject to the orders and direction of such employee, was not guilty of contributory negligence.

APPEAL from a judgment of the circuit court for Juneau county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

Action to recover for personal injuries sustained as a result of a collision between a gasoline motor car and the rear end of a passenger train. On September 4, 1912, plaintiff was in the employ of the defendant company, and in the performance of his duties was required to travel from place to place over the tracks of the Chicago, St. Paul, Minneapolis & Omaha Railway Company on a motor car owned by the defendant. At the time of the accident plaintiff with one Castle, another employee of the defendant, was riding on said motor car from Camp Douglas to Elroy, the car being driven and operated by Castle. A passenger train preceding them stopped in a tunnel and the motor car collided with the rear end of the train, as a result of which plaintiff was injured. The complaint charged the defendant with negligence, alleging that the car used was defective and that it was negligently operated by Castle, in that it was run at too high a rate of speed and too closely following the passenger train to be stopped in time to avoid a collision. The answer put in

issue all the material allegations of the complaint. At the close of the evidence and after motion by the defendant for a directed verdict, on motion of plaintiff the complaint was amended to allege, in addition to the negligence charged in the original complaint, negligence of defendant in failing to furnish plaintiff a safe place in which to work and negligence on the part of the person operating the car in failing to ascertain whether said tunnel was clear before entering the same, by driving said motor car into and through the tunnel at said time and place while the tunnel was dark and full of smoke, without checking and stopping the car to ascertain the conditions in the tunnel before entering. The jury returned the following special verdict:

"(1) Did the defendant at the time when and place where plaintiff was injured fail to furnish the plaintiff a place of employment as free from dangers to life and safety as the nature of the employment would reasonably permit? *A.* Yes.

"(2) If you answer the first question 'Yes,' then was such failure to so furnish a place of employment as free from dangers to life and safety as the nature of the employment would reasonably permit the proximate cause of the plaintiff's injuries? *A.* Yes.

"(3) Did Castle, who operated the motor car, fail to exercise ordinary care in driving the motor car into and through the tunnel until it collided with the train? *A.* Yes.

"(4) If you answer the last question 'Yes,' then was such failure to exercise ordinary care the proximate cause of the plaintiff's injuries? *A.* Yes.

"(5) Did the plaintiff, as the motor car approached and entered the tunnel and proceeded until the collision happened, fail to exercise ordinary care, which contributed to his injuries, in the performance of his duty on the motor car and in taking such precautions for the safety of the occupants of the car as the situation and circumstances required? *A.* No.

"(6) If the plaintiff is entitled to recover, at what sum do you assess his damages? *A.* $6,053.80."

The court found that the damages awarded by the jury were excessive, and plaintiff was given the option of remitting

damages in excess of $4,500 or being granted a new trial, and upon remission by plaintiff of such excess judgment was entered accordingly. Defendant appeals.

For the appellant there was a brief by *Williams & Stern,* and oral argument by *Burdette F. Williams.*

Clinton G. Price, for the respondent.

The following opinion was filed March 2, 1915:

BARNES, J. If the safe-place rule prescribed by sub. (11) of sec. 2394—41 and in sec. 2394—48, Stats., has reference to the physical situation, as is held in *Rosholt v. Worden-Allen Co.* 155 Wis. 168, 174, 144 N. W. 650, then we are unable to find any evidence which would justify the submission of the first question in the special verdict to the jury, or that would warrant the jury in answering it in the affirmative. The defendant had nothing to do with the operation of the train or the patroling of the track or the tunnel, and not a single omission of duty on its part in regard to making the place of employment less dangerous than it was is pointed out. The judgment cannot be sustained on the first ground of negligence relied on.

The respondent contends, however, that Castle was negligent (1) in entering the tunnel without first ascertaining that it was clear, and (2) in running the motor car at an excessive rate of speed after entering the tunnel. Castle was a foreman in the sense that he was boss of the operations carried on on that day, and plaintiff was expected to follow his directions. There can be no doubt that they were fellow-servants. Castle had charge of the operation of the motor car.

At this point we are met with the contention of the appellant that the complaint did not charge that Castle was negligent in not stopping before entering the tunnel and that its motion for a continuance should have been granted after the court concluded to allow the amendment. This motion was founded on the claim that defendant was surprised and was

not prepared to meet the new issue injected into the case. A motion for a new trial was made based in part upon the alleged erroneous ruling of the court in refusing to grant a continuance. It was shown by affidavit that the defendant could offer material evidence on the new issue of which it was ignorant at the time of the trial.

If the negligence of Castle in failing to stop before entering the tunnel was the only element of actionable negligence in the case and it was not set up in the original complaint, the appellant's contention should in all probability prevail. Not every claim of surprise is well founded, and trial courts have a pretty broad discretion in passing upon applications for continuances made because pleadings have been amended. It is none the less true that contests in courts must be carried on in a spirit of fairness and that a litigant should not be permitted to plead one cause of action and prove a different one, of which his adversary is not advised and which he is not prepared to meet, and then ask to amend the pleading and have the request granted without proper opportunity being given the opposing party to prepare for trial on the new issue. This case at best is a close one on the merits, including the alleged new issue of negligence. The evidence which defendant claimed it could produce on this issue, if given the opportunity, was very material and might well be controlling.

It is well settled, however, that pleadings must be liberally construed and that proof is admissible under pretty broad general allegations, and that the remedy of the opposite party in such a case is to move to make the pleading more definite and certain. *Fitts v. Waldeck,* 51 Wis. 567, 569, 8 N. W. 363; *Young v. Lynch,* 66 Wis. 514, 518, 29 N. W. 224; *Barney v. Hartford,* 73 Wis. 95, 40 N. W. 581; *Doolittle v. Laycock,* 103 Wis. 334, 336, 79 N. W. 408; *Downer v. Tubbs,* 152 Wis. 177, 179, 139 N. W. 820.

The original complaint, among other things, charged that Castle was negligent in running the motor car "too fast and

too close to said passenger train, and by failing to seasonably check and stop said car in time to avoid colliding with said passenger train as aforesaid."

There is a good deal of merit in the claim that this language could reasonably be understood as referring only to the operation of the car after it entered the tunnel. But it was fully understood that the smoke was so dense in this tunnel, which was 900 feet long, that it was impossible to see objects after entering it. As a matter of fact, the train was not seen until the motor car was within about two feet of it. The complaint did allege that it was Castle's duty to stop the car in time to avoid a collision with the passenger train. In view of conditions known to exist, the proper place to stop in order to avoid a collision might well be before entering the tunnel. While the construction placed upon the complaint by the defendant's counsel was natural enough, we think, under the liberal rule of construing pleadings referred to, it was broad enough to justify the admission of evidence to show that Castle was negligent in not bringing the car to a standstill before going into the tunnel, so as to ascertain whether or not the way was clear. Construing the original complaint as we do, it was not necessary to amend it and the court did not err in refusing to grant a new trial because it was in fact amended.

Appellant argues that Castle was not negligent in failing to stop the motor car before entering the tunnel or in operating the car within the tunnel. On the first point it is said that it is unusual for a passenger train to stop between stations and that Castle had no reason to suppose the train he was following would make such a stop. Further, that if a stop was made Castle had no reason to suppose that the rear end of the train which was in the tunnel would not be protected either by a light, a torpedo, or a flagman. Further, that Castle ascertained from the operator at Hustler, the next station north of the tunnel, that the train had a clearance to Elroy. Further, that Castle was anxious to get to the yard

limits at Elroy soon after the train reached the station so as to sidetrack for a north-bound train which was to pass the train which plaintiff and Castle were following at Elroy. Further, that as plaintiff and Castle approached the tunnel the watchman employed by the railway company at the tunnel signaled them that everything was all right ahead.

On the second question appellant argues that the evidence shows without dispute that the car was running slowly (not to exceed four miles per hour) at the time of the collision, and that this evidence is corroborated by the fact that the motor car did not leave the track and was not injured by the collision, and by the statement of plaintiff that the car was running so slowly that he could have stepped off without difficulty or danger had he seen the train in time to do so. The testimony further showed that the car could have been stopped within a very few feet by the application of the brake, at the rate of speed at which it was going.

In support of the respondent's contention that Castle was negligent in not stopping before entering the tunnel it appeared that there had been a washout near Hustler, and that the train stopped before clearing the tunnel because of the soft and doubtful condition of the track ahead; that the train belonged to the Northwestern Company and was being run over the Omaha tracks as a special. The injury occurred on September 4, 1912, at what inferentially rather than directly appears to have been a time of high water in this vicinity, so the motor car was following a special train under somewhat unusual conditions. The flagman testified that it was no part of his duty to give signals to trains or motor cars. He said he did not warn Castle in regard to running through the tunnel and did not signal him to stop. He does not categorically deny giving a signal to go ahead, although he may have intended to do so. There is no doubt that he made some motion,—whether in the way of salutation, or signal that it was all right to go through the tunnel, is not entirely clear.

There is no doubt in the evidence that plaintiff and Castle understood the motion made as a signal to go ahead. The plaintiff so testified two or three times, and finally qualified his statements to the extent of saying that the motion made might be understood as a salutation merely or as a signal to go ahead. It appeared, however, that the smoke was so dense in the tunnel that it was impossible to see anything in it; that the motor car was following up the train pretty closely; that the flagman would have been obliged to walk over 2,000 feet after the train passed and before the motor car came up in order to know that the tunnel was clear, and that it must have been obvious that the signal meant little or nothing, because the flagman had not had sufficient time to pass through the tunnel and return after the train had gone through.

In reference to the rate of speed in the tunnel, it was perhaps difficult to estimate it exactly owing to the darkness. The fact that the motor car remained on the track and was not broken is significant. But the plaintiff was severely hurt. The train was struck hard enough so that not only was the plaintiff thrown off the motor car, but Castle, who was sitting behind him, was thrown off and landed across plaintiff.

There were a number of things which Castle might have done which would have prevented the accident. He might have waited until the tunnel was clear of smoke before entering it. He might have sent plaintiff ahead to see that it was clear, or have gone himself. He might have run his car so slowly that no serious consequences would result from its coming in contact with the train. If he could not run it thus slowly under its own power, he and plaintiff could have pushed it through the tunnel with the power shut off. There was no apparent need for rush or hurry. Castle no doubt wanted to sidetrack for the north-bound train at Elroy, but he testified that he alone could lift the motor car off the track without serious difficulty.

This court is of the opinion that the jury might find that

Castle did not exercise ordinary care in failing to take some of the precautions suggested to provide for his own safety and that of his co-worker. The answer to the third question in the special verdict must therefore be permitted to stand.

It is suggested that, if Castle was negligent, the plaintiff was guilty of contributory negligence. This conclusion by no means follows. Castle had charge of the operation of the motor car and the plaintiff was subject to his orders and direction, and the jury might well find Castle negligent in the operation of the car and acquit plaintiff of negligence in riding on it. Some other errors are assigned and argued, but they do not call for special treatment.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, with $25 costs, on May 18, 1915.

GIST and another, Respondents, vs. EQUITABLE SURETY COMPANY OF ST. LOUIS, MISSOURI, imp., Appellant.

February 10—May 18, 1915.

Removal of action from state to federal court: Citizenship and residence of corporations: Garnishment: Release: Undertaking: Discharge of surety by amendment of complaint: Fraud: Estoppel: Interest.

1. A suit commenced in a state court in a federal district of which neither plaintiff nor defendant is a resident, though they reside in different states, cannot be removed to the federal court of the state wherein the action is pending, because such federal court had no jurisdiction of the original suit.
2. Under the statute governing removal of cases from state to federal courts, the citizenship and residence of a corporation are conclusively presumed to be the state of its incorporation, and are limited thereto even though it may have been licensed to do business in another state.

3. An undertaking in release of garnishment under sec. 2771, Stats., is to be liberally construed in furtherance of its purpose to protect the creditor.
4. The rights of the surety in such an undertaking were not prejudiced by amendment of the complaint in the original action so that it asked a recovery upon *quantum meruit* instead of upon express contract, where no change in the substance of the claim was involved; and such amendment, therefore, did not discharge the surety.
5. The allegation in the original complaint in such case that the work and labor for which recovery was sought was performed under an express contract, when in fact such contract was invalid because made on Sunday, did not constitute a misrepresentation in the nature of a fraud as to the surety which should estop plaintiff from enforcing the undertaking.
6. Upon recovery of judgment against the surety on such an undertaking for the amount of the judgment in the original action, interest was properly allowed upon such amount from the date of the entry of the original judgment.

APPEAL from a judgment of the circuit court for Columbia county: MARTIN L. LUECK, Judge. *Affirmed.*

The plaintiffs, as copartners, brought action against the *Equitable Surety Company* upon a bond, which bond had been given in a previous action against defendant Johnson-Carey Company.

Both parties are nonresidents. The previous action was brought first upon a complaint alleging an express contract entered into by the plaintiffs and the Johnson-Carey Company. This was later amended to one of *quantum meruit.* It appeared in that trial that the Johnson-Carey Company were subcontractors of the Winston Brothers Company. This latter company was the principal contractor with the Milwaukee, Sparta & Northwestern Railway Company to do the grading for the construction of its railroad. They sublet a portion of this contract to the Johnson-Carey Company and they to the plaintiffs. The plaintiffs sued the Johnson-Carey Company, alleging that there was due them on the contract and for damages in delay in executing their contract the sum of $53,616.34. When that action was first commenced the

Winston Brothers Company and the Milwaukee, Sparta & Northwestern Railway Company were sued as garnishees. The *Equitable Surety Company* upon petition of the Johnson-Carey Company entered into an undertaking to release these garnishees and the release was granted. By the undertaking of the Johnson-Carey Company as principal and the *Equitable Surety Company* as surety they undertook to pay the plaintiffs the amount of the judgment that was recovered by the plaintiffs in the action against such defendant, not to exceed the sum of $55,000. The plaintiffs in that action recovered judgment against the Johnson-Carey Company for the sum of $44,915.37 and costs, which made a total of $45,440.27. None of this has ever been paid.

It further appears in the original action that before the time to answer had expired the defendant Johnson-Carey Company appeared specially and petitioned the circuit court for Columbia county to allow a removal of the action to the district court of the United States for the Western district of Wisconsin. The circuit court refused to grant the petition and the defendant then answered. During the progress of the trial the defendant brought to the attention of the court the fact that the contract was in fact executed on a Sunday, although dated on Monday. This remained undisputed, and it was then that the court allowed the plaintiffs to amend the complaint and proceed on the basis of *quantum meruit* instead of upon the alleged express contract.

After judgment was entered in the original action of *Gist and others v. Johnson-Carey Company* the plaintiffs demanded payment of the amount of the judgment from the *Equitable Surety Company,* but payment was refused. The present action was then commenced upon the undertaking of the *Equitable Surety Company* by which the release of the original garnishees had been obtained.

The circuit court awarded judgment on the bond for the amount of the former judgment with interest at six per cent.

from April 22, 1913, the date of the judgment. From such judgment this appeal is taken by the *Equitable Surety Company.*

For the appellant there was a brief signed by *Grotophorst, Evans & Thomas,* attorneys, and *Boyle & Priest,* of counsel, and oral argument by *Evan A. Evans.* To the point that the amendment of the complaint changed the cause of action and either released the surety entirely or relieved it from any added liability, they cited *Meinshausen v. A. Gettelman B. Co.* 133 Wis. 95, 113 N. W. 408; *Ball v. Claflin,* 5 Pick. 303; *Comm. v. A. B. Baxter & Co.* 235 Pa. St. 179, 84 Atl. 136, 42 L. R. A. N. S. 484; *Cassidy v. Saline Co. Bank,* 7 Ind. Terr. 543, 104 S. W. 829; *Wood v. Denny,* 7 Gray, 540; *Fish v. Barbour,* 43 Mich. 19, 4 N. W. 502; *Prince v. Clark,* 127 Mass. 599; *Bolton v. Nitz,* 88 Mich. 354, 358, 50 N. W. 291; *Campau v. Seeley,* 30 Mich. 57, 61; 3 Am. & Eng. Ency. of Law (2d ed.) 637; 5 Cyc. 28; *Langley v. Adams,* 40 Me. 125; *Sage v. Strong,* 40 Wis. 575; *Oconto Co. v. Esson,* 112 Wis. 89, 87 N. W. 855.

For the respondents there was a brief by *W. S. Stroud, R. F. Clark,* and *Olin, Butler, Stebbins, Curkeet & Stroud,* and oral argument by *H. L. Butler* and *W. S. Stroud.*

The following opinion was filed March 2, 1915:

SIEBECKER, J. It is claimed that the court erred in denying removal of the original action from the state to the federal court. The plaintiffs in the original suit, *Wm. M.* and *George W. Gist,* at the time they commenced action against the Johnson-Carey Company were residents respectively of the states of Missouri and Illinois and the defendant Johnson-Carey Company was a corporation created under the laws of Delaware, and for the purposes of the proceeding to remove the action to the federal court was a citizen and resident of the state of Delaware. Before defendant was required to answer it made an application to the Columbia

county circuit court and prayed for "removal of said suit into the district court of the United States to be held in the district where said suit is pending, viz. district court of the United States in and for the Western district of Wisconsin." The bond accompanying this application bound the obligors upon condition that the Johnson-Carey Company enter, in the district court for the Western district of Wisconsin within the time therein specified, a certified copy of the record in the suit. The face of the removal proceedings shows that it was an application to remove the action from the state court to the federal district court for the Western district of Wisconsin. It is manifest that the application for removal did not ask to have the case removed to the federal court of the district of the residence of either the plaintiffs or the defendant. The record shows affirmatively that the case is not one arising under the laws of the United States and that the application for removal is based upon the diversity of citizenship of the parties. The defendant is a Delaware corporation and hence under the federal statute for removal of the case from state to federal court is deemed to be a resident of that state and is accorded the same rights as a citizen. It is established by the adjudications of the federal courts that a suit commenced in a state court in a federal district of which neither plaintiff nor defendant is a resident, though they are residents of different states, cannot be removed to the federal court of the state wherein the action is pending, for the reason that such federal court had no jurisdiction of the original suit. *Ex parte Wisner,* 203 U. S. 449, 27 Sup. Ct. 150; *Western L. & S. Co. v. Butte & B. C. M. Co.* 210 U. S. 368, 28 Sup. Ct. 720; *Stewart v. Cybur L. Co.* 211 Fed. 343; *Gruetter v. Cumberland T. & T. Co.* 181 Fed. 248. The citizenship of the defendant Johnson-Carey Company is conclusively presumed to be the state of Delaware and under the federal removal statute is limited thereto, though it may have been licensed to do business in Wisconsin. *St. Louis & S.*

F. R. Co. v. James, 161 U. S. 545, 16 Sup. Ct. 621; *Baldwin v. Pacific P. & L. Co.* 199 Fed. 291, and cases there cited.

It is strenuously contended that the defendant, the *Surety Company,* is released from the obligations of the undertaking given by it for the release of the garnishees, upon the ground that the amendment of the plaintiffs' complaint at the trial from one on express contract to one on *quantum meruit* so changed the grounds of liability of the defendants in the case as to constitute a complete change in the cause of action and thereby released the surety. The rights of a creditor to proceed by garnishment in aid of a recovery on express or implied contract are to be liberally enforced in such proceedings and the undertaking given pursuant to the provisions of sec. 2771, Stats. 1913, is to be liberally construed. *Smith v. Lockwood,* 34 Wis. 72. The undertaking in terms is an agreement "on demand to pay to the plaintiffs the amount of the judgment, with all costs that may be recovered against such defendant in the action." The purpose of the statute is to hold the parties to the undertaking for the full amount of the judgment in place of the garnishees, regardless of the amount impounded by the garnishment. The provisions of the statute have always received a liberal construction to accomplish the purpose of the remedy, namely, protection of a creditor to receive payment of the judgment awarded him in the main action. *Sutro v. Bigelow,* 31 Wis. 527; *Smith v. Lockwood,* 34 Wis. 72; *Wilkinson v. United States F. & G. Co.* 119 Wis. 226, 96 N. W. 560. As stated in the *Sutro Case* respecting the liability of the parties to an undertaking under this statute, "they make his [garnishee's] liability to the plaintiffs in the action their liability to the extent named in the undertaking; and, identifying themselves in interest with him, agree to abide the results of the litigation so far as he is concerned." The whole proceeding of substituting the undertaking in place of the garnishee presupposes that all the steps required to be taken in a judicial trial of the original

action in prosecuting it to judgment are authorized as within the scope of such undertaking. It is clear that the right of amending the complaint existed and that the court on the trial of the original action properly amended the complaint from one on express contract to one on *quantum meruit. Gist v. Johnson-Carey Co.* 158 Wis. 188, 147 N. W. 1079. It is urged that this was a prejudicial proceeding against the sureties. How this operated to the sureties' prejudice is not manifest. An inspection of the two complaints shows that the allegations covered and embraced the identical transactions, resting on the same basic claim, namely, compensation for the work and labor performed, at the same price throughout, with this difference, that in the original complaint the agreements in relation thereto were alleged to be express, while in the amended complaint they were implied, but in their totality and substance they were identical; the only difference being in the way these agreements were evidenced. Under such a state of affairs there is no difference in the substance of the claim made by plaintiffs in their two complaints, and allowance of the amendment was plainly authorized as within the undertaking of the surety and cannot be held to have prejudiced its rights. *Thomas v. Halch,* 53 Wis. 296, 10 N. W. 393; *Tilton v. Cofield,* 93 U. S. 163.

The contention that the allegation in the original complaint, that the work and labor for which plaintiffs sought to recover compensation was performed pursuant to an express contract, when in truth and fact no such contract existed, constituted a misrepresentation in the nature of fraud as to the surety and should estop plaintiffs from enforcing the undertaking, has no foundation in fact and substance; nor did such allegation in fact induce the giving of the bond. We have already adverted to the proposition that the amendment in no way changed the nature of the claim nor the grounds of recovery. The claim of the original and amended complaints arose out of the same transaction and claimed recovery for

the same amount and for the identical items at the same cost. On this point the allegations in each pleading must control, and confining our view to them we discover no material difference in the grounds of recovery. "The description of the cause of action was changed, but in the view of equity, and in point of fact, it was substantially the same with that originally described. Allowing amendments is incidental to the exercise of all judicial power, and is indispensable to the ends of justice." *Tilton v. Cofield,* 93 U. S. 163. The very nature of the rights involved to change the pleadings precludes any inference of fraud and estoppel in relation thereto. The contention of appellant on this point must be rejected as having no merit.

Within the rule of *Eau Claire Nat. Bank v. Chippewa Valley Bank,* 124 Wis. 520, 102 N. W. 1068, the plaintiffs were entitled to payment of their judgment in the original action upon its entry, and payment thereof by the surety who stood in place of the garnishees. For delay in such payment plaintiffs are entitled to interest. The court properly awarded the recovery of interest against the surety.

By the Court.—The judgment appealed from is affirmed.

A motion for a rehearing was denied, with $25 costs, on May 18, 1915.

SADOWSKI, Administratrix, Respondent, vs. THOMAS FURNACE COMPANY, Appellant.

March 4—May 18, 1915.

Adverse witnesses: Impeachment: Master and servant: Death: Contributory negligence: Questions for jury: Special verdict: Refusal to submit proposed questions: Harmless errors: Excessive damages.

1. An adverse witness, called under sec. 4068, Stats., may be asked impeaching questions by the party calling him, for the purpose of showing that he previously made contradictory statements.

2. In an action for death of a laborer caused by a mass of frozen iron ore rolling down from the top of a pile at the foot of which he was working, the evidence being conflicting as to whether he had been warned of the danger of working there and ordered to work in another place, the question of his contributory negligence was one for the jury.
3. A judgment for plaintiff having been reversed on a former appeal because of failure to submit certain questions to the jury, the rest of the special verdict not being regarded as improper, and such questions having been submitted on the second trial together with those submitted on the first, the refusal to submit other additional questions proposed by defendant is *held* not a prejudicial error.
4. For the death of a laborer thirty-two years of age who left surviving him a wife and three small children and whose income was about $1,000 per year, an award of $8,500 is *held* excessive and is reduced to $6,000. KERWIN, J., dissents.

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Modified and affirmed.*

This is an appeal from a judgment in favor of the plaintiff for $8,500, which was entered on the following special verdict:

"(1) Did the defendant furnish to the deceased a place of employment as free from danger to life and safety as the nature of the employment would reasonably permit? *A.* No.

"(2) If you answer the foregoing question 'No,' then answer: Was such failure on the part of the employer the proximate cause of the death of the deceased? *A.* Yes.

"(3) Did the defendant adopt and use methods and processes reasonably adequate to render the employment and place of employment of the deceased safe? *A.* No.

"(4) If you answer the foregoing question 'No,' then answer: Was such failure on the part of the employer the proximate cause of the death of the deceased? *A.* Yes.

"(5) If you answer the first and third questions 'Yes,' then answer: Did the defendant do everything reasonably necessary to protect the life and safety of the deceased? *A.* ——.

"(6) If you answer the foregoing question 'No,' then an-

swer: Was such failure on the part of the employer the proximate cause of the death of the deceased? *A.* ——.

"(7) Was the death of the deceased proximately caused by the want of ordinary care of other employees of the defendant acting within the scope of their employment? *A.* Yes.

"(8) Did George Babic warn deceased of the dangers incident to the work deceased was engaged in at the ore pile? *A.* No.

"(9) Did George Babic direct deceased and Tapovich, on the afternoon of the day of the accident, to move from the place where they were working to another part of the ore pile? *A.* No.

"(10) If you answer the preceding question 'Yes,' then answer this question: If you have found that Babic directed deceased and Tapovich to move to another place, did deceased decline to do so and elect to continue working at the place where the frozen ore fell upon him? *A.* ——.

"(11) What sum will reasonably compensate the plaintiff for the pecuniary loss which she has sustained by reason of the death of the deceased. *A.* $8,500."

The case was here before. 157 Wis. 443, 146 N. W. 770. On the former appeal it was sent back for a new trial because of the failure of the trial court to submit to the jury the question as to warning, particularly as to decedent having been ordered to cease working in a particular place and go to another specified place where there was no danger. This court also on the former appeal and upon the evidence then before it found that a jury might place the recovery as low as $4,000, and further that a recovery on evidence similar to that before the court on the former appeal for more than $5,000 would be excessive.

For the appellant there was a brief by *Doe, Ballhorn & Wilkie,* and the cause was argued orally by *J. B. Doe* and *H. M. Wilkie.*

For the respondent there was a brief signed by *J. C. Kleczka* and *Glicksman, Gold & Corrigan,* and oral argument by *Mr. W. L. Gold* and *Mr. Kleczka.*

The following opinion was filed March 23, 1915:

KERWIN, J. 1. Error is assigned because it is said the court allowed the respondent to impeach his own witness called under the provisions of sec. 4068, Stats. The argument of counsel for appellant is that, although the witness was called as an adverse witness, there is no authority under the statute to ask impeaching questions by showing that he previously made contradictory statements. The following question was objected to and objection overruled:

"*Q*. Well, at the time that you were called as a witness on the former trial, was this question put to you and did you make this answer: *Q*. Now, at any time during that time, did you talk to the foreman about taking down this particular piece? *A*. Yes, we did; we spoke to him between 9 and 10 in the morning time."

There was no error in the ruling. *Depouw v. C. & N. W. R. Co.* 154 Wis. 610, 143 N. W. 654; *Adams v. Bucyrus Co.* 155 Wis. 70, 143 N. W. 1027.

2. Error is assigned because the court overruled appellant's motion for a directed verdict. It is argued by counsel for appellant that the evidence is undisputed that the two men killed by the fall of the ore had their attention called to the danger, were warned, and ordered to work in another place; that contrary to such orders they continued in the dangerous place, and that the evidence shows as matter of law that they were guilty of contributory negligence. On the part of the respondent it is argued that the evidence was conflicting and contradictory and that the question was properly for the jury. The evidence in support of each contention is set out at considerable length by respective counsel, and after a careful examination of the record we are satisfied that the question was for the jury, therefore the motion to direct a verdict for defendant was properly overruled. Some claim is made by

counsel that the court below held that the question of the sufficiency of the evidence was foreclosed by the judgment on the former appeal, therefore that the court did not pass upon the sufficiency of the evidence on the present appeal. We do not so understand the record, but on the contrary we find that the court below did on the present appeal hold that there was evidence sufficient to carry the case to the jury, regardless of the holding when the case was here before.

3. It is also insisted that the court below erred in refusing to submit to the jury the following questions requested by appellant:

"(4) Before the accident, was the danger that lumps of frozen ore, large enough to cause bodily injury, might fall, open and obvious to a person of full age, ordinary intelligence, and the experience possessed by deceased?

"(5) Was any danger that frozen lumps of ore might fall upon deceased known to defendant and not known to deceased?

"(6) Was there any danger that frozen lumps might fall upon deceased, which defendant ought to have known, but which deceased in the exercise of ordinary care ought not to have known?"

When the case was here on former appeal the judgment was reversed because of failure to submit questions 8 and 9 now in the record. The balance of the verdict was not regarded improper, and on the last trial questions 8 and 9 were added by direction of this court. Upon the whole record we are satisfied that there was no prejudicial error in refusing to submit the questions requested.

4. Error is assigned on the charge and in refusal to grant a new trial. We find no prejudicial error in this regard aside from the question of whether the damages are excessive.

5. It is claimed that the damages are excessive. On the first trial the evidence tended to show that the income of deceased was about $425 per year, while on the last trial there was evidence sufficient to warrant the jury in finding that the income of deceased was about $1,000 per year. The writer

is of opinion that the damages are not excessive and should not be reduced, but the majority of the court think the damages should be reduced to $6,000.

By the Court.—The judgment is modified by reducing the damages to $6,000, and as so modified is affirmed as of the date of the judgment. No costs are allowed either party on this appeal, except that the respondent pay the clerk's fees in this court.

A motion for a rehearing was denied, with $25 costs, on May 18, 1915.

W. H. PIPKORN COMPANY, Respondent, vs. TRATNIK and wife, Appellants, and others, Respondents.

March 3—June 1, 1915.

Mechanics' liens: Subcontractors: Right to lien for materials: Improper use by principal contractor: Condemnation of building: Inchoate dower right.

1. Where the principal contractor for the basement walls of a building purchased suitable materials from subcontractors, but constructed such walls therefrom in so improper and unsafe a manner that the walls were condemned by the building inspector and had to be torn out, the subcontractors were nevertheless entitled to liens under sec. 3315, Stats. *Houlahan v. Clark*, 110 Wis. 43, distinguished.
2. The principal contractor was in such case the agent of the owner and acted within the scope of his authority in purchasing the materials, and his default in improperly using them—even though it might deprive him of the right to enforce a lien—did not affect the rights of the subcontractors in that respect any more than if the owner himself had improperly used such materials.
3. The mechanic's lien statute does not authorize the cutting off of the inchoate dower right of the wife of the owner of the premises, where she did not know of or consent to the making of the improvements thereon.

KERWIN and SIEBECKER, JJ., dissent.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed as to one appellant; reversed as to the other.*

Plaintiff brought this action as a subcontractor of the defendant Granite Sidewalk Company to enforce a claim for mechanic's lien against the defendants *Joseph* and *Mary Tratnik.* The complaint alleged that the Granite Sidewalk Company was a principal contractor employed by the defendant *Joseph Tratnik* for the construction of the walls of the basement and other cement and concrete work on a certain building to be erected upon the property of the defendant *Tratnik;* that plaintiff as a subcontractor of the Granite Sidewalk Company furnished building materials to be used in the construction of said walls and building; and that there was still due the plaintiff from said defendant the sum of $284.83. The other defendants, *Lake Shore Stone Company, Arthur J. Reiske, Sands Lumber Company,* and *P. J. Lavies & Company,* subcontractors and materialmen, served cross-complaints for their respective claims to enforce same under the mechanic's lien statute.

The answer of the defendants *Tratnik* alleged, among other things, that the work done in the construction of said walls by the Granite Sidewalk Company was performed in such an unsatisfactory, improper, and unsafe manner that it was condemned by the building inspector of the city of Milwaukee and was never accepted by the defendants *Tratnik* or by the architect and superintendent of said building, to whose satisfaction, under the terms of the contract, the work was to be performed; that numerous notices were served upon the Granite Sidewalk Company requesting them to perform the work in compliance with the terms of the contract and that it failed, neglected, and refused to do so; and that the defendants were obliged to have the entire work torn down and removed and to have said walls and other work provided for in the contract reconstructed at a cost of $1,950.

Judgment was entered in favor of the plaintiff, adjudging a subcontractor's lien against the property of the defendants *Joseph* and *Mary Tratnik*, and in favor of the various other subcontractors named as defendants herein for the amounts claimed by them for materials furnished. From such judgment this appeal is taken.

For the appellants there was a brief by *Doerfler, Green & Bender*, and oral argument by *Christian Doerfler*.

For the respondents there was a brief by *Lorenz & Lorenz*, attorneys for *Sands Lumber Company, A. J. Reiske*, and *P. J. Lavies & Company*, by *Otjen & Otjen*, attorneys for *Lake Shore Stone Company*, by *James T. Drought*, attorney for *W. H. Pipkorn Company*, and by *Ira S. Lorenz*, of counsel; and the cause was argued orally by *Mr. Drought*.

The following opinions were filed April 13, 1915:

BARNES, J. It is not improbable that the owner of the premises involved and the subcontractors are innocent of any wrong. If so, one or the other must suffer for the default of the principal contractor, and the question is, which? The owner could have protected himself in the first instance by dealing with a responsible party or else by requiring an adequate bond. But there were also means open to the subcontractors to protect themselves.

The relation between owner, principal contractor, and subcontractor has been pretty well settled by this court. The principal contractor is the agent of the owner to purchase the materials required by the principal contract. The owner consents that the principal contractor may do what is necessary to carry out the principal contract and makes his property liable therefor in accordance with the statute, which becomes a part of the contract. *Siebrecht v. Hogan*, 99 Wis. 437, 441, 75 N. W. 71; *Taylor v. Dall L. & Z. Co.* 131 Wis. 348, 111 N. W. 490.

The materials here furnished by the subcontractors con-

sisted of crushed stone, lumber for falsework in basement walls, gravel, cement, and flue linings for chimneys, and elbows and galvanized iron. There is no claim that the material was not such as the principal contract called for and as the principal contractor was required to furnish under his contract. The court expressly found that the materials furnished by the subcontractors were of a merchantable quality and in accordance with the contract entered into between the owner and the principal contractor. The court further found that the necessity for tearing out the walls was due to improper method of construction and not because of the material used being defective.

As far as the rights of the subcontractors are concerned, it can make no difference whether the owner himself contracted for the materials or his duly authorized agent did so. The owner is responsible for the authorized acts of his agent, the principal contractor, to the same extent that he would be liable had he done the acts himself.

The real question, therefore, is: Would the subcontractors have a lien if the material had been purchased by the owner and had been wrought into the walls by the servants or contractors of the owner, but by reason of poor workmanship the walls had to be removed and the material destroyed? This court has held that, where a principal contractor delivers material on the ground to be used in the erection of a building, he is entitled to a lien although the owner sells the material and it is used elsewhere. *Esslinger v. Huebner,* 22 Wis. 632. It is so ruled in *Fitzgerald v. Walsh,* 107 Wis. 92, 98, 82 N. W. 717, and in *Spruhen v. Stout,* 52 Wis. 517, 9 N. W. 277, and these cases are approved in *Francis & N. F. Co. v. King Knob C. Co.* 142 Wis. 619, 622, 126 N. W. 39. The destruction of the material delivered was no more complete in the instant case than it was in *Halsey v. Waukesha Springs S. Co.* 125 Wis. 311, 104 N. W. 94, where the building was destroyed by fire and where it was held that the right of lien

existed for the burned material. As the court there points out, a mechanic's lien may fasten on land before any building or structure exists thereon, and, if so, "it may persist after any such structure disappears."

In *Fitzgerald v. Walsh, supra,* an architect was allowed a lien on the land on which a building was to be erected, although the construction was abandoned after the excavation was made.

It has also been held that the fact that the principal contractor has not complied with the conditions of his contract so as to enable him to enforce a lien on the building will not militate against the subcontractor enforcing such a lien if the subject of the subcontractor's lien might in any event be lienable in favor of the principal contractor. *Seeman v. Biemann,* 108 Wis. 365, 84 N. W. 490.

There is no conflict between the cases cited and *Houlahan v. Clark,* 110 Wis. 43, 85 N. W. 676. There the principal contractor was held not to be the agent of the owner because he did not build the kind of a structure which his contract called for nor at the place the contract called for. The contractor was acting without the scope of his authority in doing what he did, and his acts were therefore held not to be binding on his principal. Here the contractor was acting strictly within his authority in purchasing the materials which were delivered by the lien claimants. His default occurred in improperly using such materials. It seems clear that the materialmen are no more affected by the default of the owner's agent in this regard than they would be had the owner himself made the improper use of the materials. It is clear that had the owner himself purchased the material in question to be used in the basement walls, and it was so used by the contractor, a right of lien would attach to the land, although the construction, because of poor workmanship, became worthless. If so, we see no escape from the proposition that the same result would follow where the purchase of the

material was made by an agent acting within the scope of his authority in purchasing the material.

Mary Tratnik was evidently made a party defendant for the purpose of barring her inchoate right of dower. It was neither proven nor found that she knew the improvement in question was being made or that she consented thereto. We do not think the mechanic's lien statute was intended to reach an inchoate dower right and cut it off as a matter of course whenever the interest of the husband owner was cut off. If *Joseph Tratnik* should die before his wife, the judgment would bar her dower right in the property, provided it was sold to pay the lien claims. In this respect it is erroneous. Phillips, Mech. Liens (3d ed.) sec. 195.

By the Court.—Judgment affirmed as to *Joseph Tratnik* and reversed as to *Mary Tratnik,* and cause remanded for further proceedings according to law.

KERWIN, J. (*dissenting*). The facts are undisputed. The Granite Sidewalk Company, principal contractor, was employed by appellant *Joseph Tratnik* to construct basement walls of cement upon his property. The plaintiff furnished to the Granite Sidewalk Company, principal contractor, for such work, cement which was used by the principal contractor in a structure on the appellant's property, which afterwards, on account of improper construction, was condemned by the city inspector and ordered torn out, and was torn out and removed because not in compliance with the city ordinance or contract with the appellant.

The question presented is whether the plaintiff had a lien for material furnished to the principal contractor which was rendered valueless by the failure of the contractor to perform his contract, therefore did not become a part of the structure upon appellant's premises or add to its value and without any fault on the part of the appellant. The defendant Granite Sidewalk Company, principal contractor, violated its contract

with appellant and the ordinance of the city in erecting a structure on appellant's premises which was of no value and in violation of the city ordinance.

The question arises whether the appellant is liable for the material bought by the defendant Granite Sidewalk Company and destroyed. The subcontractor acquires no right of lien, where the material never became part of the structure, simply by delivery to the principal contractor. *Francis & N. F. Co. v. King Knob C. Co.* 142 Wis. 619, 621, 126 N. W. 39, and a long line of Wisconsin cases cited. It is well settled by the decisions of this court that the materialman in delivering material to the principal contractor acquires no greater right than the principal contractor. In *Seeman v. Biemann,* 108 Wis. 365 (84 N. W. 490), at page 378 this court said:

"The subcontractor's authority to bind the principal depends upon the right of his principal to do so under the same circumstances. To that extent only the proprietor is deemed by force of the statute to have authorized the principal contractor to indirectly bind his principal under the lien laws of the state."

The principal contractor binds the owner when acting within the scope of his authority and not otherwise. If the materialman sells material and delivers it to the original contractor and the original contractor fails to use the same in the structure, but uses it elsewhere, the materialman has no lien for the material so diverted. *Francis & N. F. Co. v. King Knob C. Co., supra.*

It is the duty of the principal contractor, in order to subject the owner's premises to a lien, to perform his contract and use the material so as to become a part of the structure contemplated by the contract between the owner and the principal contractor. *Francis & N. F. Co. v. King Knob C. Co., supra.* In order to secure the lien given the materialman by the statute it is necessary that the principal contractor com-

ply with his contract with the owner and make the material furnished a part of the structure and thereby add to its value. *Houlahan v. Clark,* 110 Wis. 43, 85 N. W. 676.

The right to a mechanic's lien given by the statute is based upon considerations of natural justice, namely, that one who has enhanced the value of property by attaching thereto his property or labor shall have a claim on such property for the value of such labor or material. This is the doctrine of the decisions of this court.

To secure a lien by the materialman the contractor must keep within the scope of his contract with the owner. *Houlahan v. Clark, supra.* This is admitted by respondent's counsel in their brief, where they say in referring to the claim made by appellant: "The proposition above stated merely means that the right of the subcontractor is restricted within the scope of the contract existing between the owner and the principal contractor." Where the contractor complies with his contract with the owner and erects a lawful structure upon the premises, the materialman has a lien for the material furnished and placed in such structure. But where the contractor erects an unlawful structure—a nuisance—contrary to his contract with the owner and in violation of the city ordinance, in consequence of which it is ordered abated and removed and is abated and removed, the materialman has no lien for the material used in such unlawful structure. This doctrine is in harmony with the Wisconsin decisions. *Siebrecht v. Hogan,* 99 Wis. 437, 75 N. W. 71; *Seeman v. Biemann,* 108 Wis. 365, 84 N. W. 490; *Houlahan v. Clark,* 110 Wis. 43, 85 N. W. 676; *Taylor v. Dall L. & Z. Co.* 131 Wis. 348, 355, 111 N. W. 490; *Francis & N. F. Co. v. King Knob C. Co.* 142 Wis. 619, 126 N. W. 39; *Barker & S. L. Co. v. Marathon P. M. Co.* 146 Wis. 12, 130 N. W. 866; *Moritz v. Sands L. Co.* 158 Wis. 49, 146 N. W. 1120.

In all Wisconsin cases the basis of the lien is that the material is consumed in the structure and increases the value of

the premises. Of course a well known exception to the above rule is where the owner wrongfully diverts the material from the structure for which it is furnished. In *Barker & S. L. Co. v. Marathon P. M. Co., supra,* this court said:

"Another principle is that, if material be furnished to the owner for use in the construction of a building and the construction be actually commenced, the materialman is entitled to his lien even though the owner does not use the materials at all, but disposes of them elsewhere. . . . But if a subcontractor delivers material to the principal contractor at the latter's place of business, which materials are neither incorporated into the structure, delivered upon the premises, nor placed under control of the owner of the structure, no lien arises, because the material cannot be said to have been furnished for, in, or about the erection of the structure."

In the majority opinion the court relies upon *Fitzgerald v. Walsh,* 107 Wis. 92, 82 N. W. 717, and *Halsey v. Waukesha Springs S. Co.* 125 Wis. 311, 104 N. W. 94. In the former case it was held that an architect's lien attached as soon as the excavation of the building commenced; and in the latter the building was partially constructed when destroyed by fire. These cases are not in point here. In the former case the plans and specifications were drawn at the instance of the owner and subsequently some work was done on the premises in pursuance of the contract, and by reason of the acts of the owner the building was not completed. In the latter case the principal contractor was prevented from completing the building because of destruction by fire. All that was done up to the time of the fire was regular in pursuance of the contract with the owner, and of course the lien attached as soon as the material entered into the structure.

The majority opinion holds that the liability is the same here as if the owner had purchased the material for the building and it had been diverted or converted by him. If the owner diverted or converted the material, the materialman clearly would have a lien. But that is a very different thing

from a diversion or conversion by a contractor who had no authority to do so. The cases cited in the majority opinion clearly show the distinction. *Esslinger v. Huebner,* 22 Wis. 632; *Fitzgerald v. Walsh,* 107 Wis. 92, 82 N. W. 717; *Francis & N. F. Co. v. King Knob C. Co.* 142 Wis. 619, 126 N. W. 39. Where the principal contractor purchases from the materialman he must use the material substantially in accordance with his contract with the owner. *Houlahan v. Clark,* 110 Wis. 43, 85 N. W. 676; *Seeman v. Biemann,* 108 Wis. 365, 84 N. W. 490.

In the majority opinion, *Seeman v. Biemann, supra,* is relied upon on the point that compliance by the contractor with his contract with the owner is not necessary in order to enable the subcontractor to enforce a lien if the subject of the subcontractor's lien might in any event be lienable in favor of the principal contractor. It is distinctly held in the above case that a subcontractor's lien cannot, to the prejudice of the proprietor of the building, be extended beyond the scope of the principal contract. "The subcontractor's authority to bind the principal depends upon the right of his principal to do so under the same circumstances." 108 Wis. at p. 378.

Of course where the lien statute has been complied with and the contractor has performed his contract so as to make the material a part of the structure, and the subcontractor has served the notice required and has become entitled to a lien, then no act of the contractor can deprive him of the lien. This is the effect of the holding referred to in the majority opinion. See *Seeman v. Biemann,* 108 Wis. 365, 377–379, 84 N. W. 490.

Respondents rely strongly upon a Minnesota decision. It is unnecessary to go outside of Wisconsin for authority. The statutes of Wisconsin and the decisions here control the case.

The equities are with the appellant. The plaintiff furnished material for which he was entitled to a lien on compliance with the statute, and compliance by the contractor to

whom he furnished the same with his contract with appellant. The contractor disregarded his contract, and erected a nuisance upon the premises instead of a lawful structure. It was by lawful authority abated. If the lien is enforced the appellant is required to pay for the unlawful structure which added no value to the premises.

I cannot agree with the majority opinion, and think the judgment below should be reversed as to both appellants.

Justice SIEBECKER concurs in this dissent.

The appellant *Joseph Tratnik* moved for a rehearing.

In support of the motion there was a brief by *Doerfler, Green & Bender,* and in opposition thereto a brief by *James T. Drought,* attorney for *W. H. Pipkorn Company,* and *Henry H. Otjen,* attorney for *Lake Shore Stone Company.*

The motion was denied, with $25 costs, on June 1, 1915.

PARKES, Respondent, vs. LINDENMANN, Appellant.

March 5—June 1, 1915.

Appeal: When new trial is "ordered" by mandate: Dismissal of action for failure to bring to trial: Waiver of right: Appeal: Verdict, when disturbed: Bias of jury: Negligence: Emergencies: Automobiles: Collision with pedestrian.

1. If the mandate of the supreme court, applying it to the case in which it is made, necessitates a new trial or further proceedings in the court below, then such is the order of the supreme court within the meaning of sec. 3072, Stats. 1913, irrespective of the form of the mandate. Thus, upon appeal from an order granting a new trial, the mandate "order affirmed" orders a new trial within the meaning of said section.
2. A party desiring to have an action dismissed because not brought to trial within a year as required by sec. 3072, Stats. 1913, must act seasonably. If he unreasonably stands by and causes the other party to incur expense which might be saved if he acted

with reasonable promptness, he will be deemed to have waived the provisions of the statute.

3. A verdict approved by the trial court should not ordinarily be disturbed on appeal except in a clear case of error; but findings in such a verdict evidencing bias if not actual perverseness on the part of the jury may properly be considered as bearing upon the value of other findings therein.

4. Thus, where the plaintiff, after she had seen a moving automobile only a few feet away, stepped in front of it and was struck and injured, the bias or perverseness evidenced by a finding that a person of ordinary care would not have anticipated that a collision would probably result from moving in front of the automobile under such circumstances, has a bearing on the value of a further finding that the driver of the automobile should have anticipated that plaintiff would probably move in front of it.

5. In an emergency, where there is no time for the exercise of judgment and deliberate action upon it, a failure to take the best means to avoid an injury is not necessarily negligence.

6. Defendant, going north in an automobile and intending to turn to the east into a cross street, saw plaintiff standing two or three feet south of the south track of a street railway which ran on the cross street. She was waiting for an approaching car and stood about on a line with the east sidewalk of the north and south street. He was going not faster than six miles per hour and had reason to believe that he was within the line of her vision. He took a course by which he would pass to the west and north of plaintiff, and some three to seven feet in front of her, but when his automobile was about ten feet away she first saw it, became startled, and ran north in front of it. He at once turned southeast to go behind her and would have done so had she not immediately run to the south again in front of his car. When she did that he tried to stop and avoid her by heading his car north, but did not clear her and she was struck by the right fender. The car was stopped within two feet of where she was struck. *Held*, notwithstanding a verdict to the contrary, that defendant was not guilty of any negligence.

APPEAL from a judgment of the circuit court for Milwaukee county: W. B. QUINLAN, Judge. *Reversed.*

Action for personal injury sustained by being struck by defendant's automobile. Upon a former appeal an order of the circuit court setting aside a verdict in favor of plaintiff on the ground that it was perverse and granting a new trial

was affirmed. See *Parkes v. Lindenmann,* 148 Wis. 89, 133 N. W. 580.

When the case was called for trial the defendant moved to dismiss on the ground that it had not been brought to trial within the year as required by sec. 3072, Stats. 1913. The motion was denied and the case tried. There is very little dispute as to the facts. On November 21, 1908, at about 1 o'clock in the afternoon of a clear day at Milwaukee, the plaintiff, a woman about fifty-five years of age, was struck by defendant's automobile, a Buick weighing about 2,000 pounds, while waiting for an east-bound street car on the east side of Sixth avenue where it intersects National avenue. Sixth avenue runs north and south. National avenue runs east and west and has two street-car tracks on it. Plaintiff stood on a line with the east sidewalk of Sixth avenue and about two or three feet south of the south rail of the south car track waiting for a car from the west which was approaching and which she had signaled to stop. The defendant came north about in the center of Sixth avenue, and when just about at the intersection of the south line of National avenue exclusive of the sidewalk space he first saw plaintiff waiting for the east-bound car. He then continued in a northeasterly direction at a speed of from four to six miles per hour and would have passed to the left and in front of plaintiff at a distance of from three to seven feet had she remained standing where he first saw her. When he was within ten feet of her she for the first time, apparently, saw the automobile, though the evidence is that defendant had several times blown his horn as he approached National avenue. Upon seeing the automobile she stepped to the north and upon the south car track, whereupon he turned his automobile to the southeast to pass behind her. When she reached the middle of the car track she immediately made a few quick steps to the south in front of the moving automobile and was struck by the right fender of the

car before defendant stopped it. The jury found (1) that defendant ought in the exercise of ordinary care, in taking the line he took to pass to the north of plaintiff, to have anticipated that plaintiff would become startled and probably move in front of his automobile; (2) that the plaintiff moved to the north from the place where she was waiting for the street car in consequence of becoming startled by reason of the northeasterly direction taken by defendant's automobile; (3) that defendant failed to exercise ordinary care for the purpose of stopping his car after it became apparent to him that plaintiff would move to the south and enter the path of his car; (4) that defendant failed to exercise ordinary care in the handling of his automobile when it became apparent to him that the plaintiff would move to the south; (5) that the defendant's want of ordinary care as found was a proximate cause of plaintiff's injury; (6) that plaintiff exercised ordinary care for the purpose of ascertaining if any east-bound automobile or other vehicle was dangerously near when she stepped towards and upon the car track; (7) that the plaintiff exercised ordinary care for the purpose of ascertaining if there was any east-bound automobile or other vehicle dangerously near when she moved to the south from upon the car track; (8) that a person of ordinary care would not have anticipated that as a result of moving to the south in front of the automobile, under the circumstances shown by the testimony, a collision with the automobile would probably result; (9) that no want of ordinary care on the part of the plaintiff proximately contributed to her injury; and (10) damages in the sum of $4,000. From a judgment entered upon the verdict in favor of plaintiff the defendant appealed.

For the appellant there was a brief by *Lorenz & Lorenz,* attorneys, and *James D. Shaw,* of counsel, and oral argument by *Mr. Shaw.*

For the respondent there was a brief signed by *Otjen & Otjen,* and oral argument by *H. H. Otjen.*

The following opinion was filed March 23, 1915:

VINJE, J. The order of the trial court setting aside the verdict as perverse and granting a new trial was upon appeal affirmed by this court December 5, 1911, and a rehearing denied January 30, 1912. See 148 Wis. 89, 133 N. W. 580. In due course of time the *remittitur* was filed in the circuit court, and no claim is made that the costs were not seasonably paid. On December 23, 1913, the attorneys for plaintiff served a notice of trial upon defendant's attorney, Christian Doerfler, placing the case on the January, 1914, calendar. February 3, 1914, the case was called for trial, and the present attorneys for defendant, who since the service of the notice of trial were substituted for Christian Doerfler, moved the court to dismiss the action on the ground that it had not been brought to trial within a year as required by sec. 3072, Stats. 1913. That section provides:

"In every case in error or on appeal in which the supreme court shall order a new trial or further proceedings in the court below, the record shall be transmitted to such court and proceeding had thereon within one year from the date of such order in the supreme court, or in default thereof the action shall be dismissed, unless, upon good cause shown, the court shall otherwise order."

Upon the former appeal the mandate read "Order affirmed," and the trial court, then presided over by Judge TURNER, reached the conclusion that the case did not come within the statute because neither a new trial nor further proceedings in the court below were ordered. The conclusion was an erroneous one, based upon a construction disregarding the substance as well as the evident intent of the statute. When a circuit court by an order grants a new trial and such order is affirmed on appeal by this court, the right to a new trial is established by a judgment of this court, irrespective of the form of the mandate. The words "Order affirmed," applied to the subject matter to which they related

in this case, could mean but one thing, namely, that a new trial was by the judgment of this court granted, and hence the cause, in order to comply with that requirement, must be and was remanded to the court below for further proceedings. It was not so expressly stated in the mandate, but its only rational interpretation meant that. In volume 158 Wis. there are no less than nine cases, found at pages 262, 337, 447, 475, 529, 539, 597, 619, and 626, respectively, in which the mandates have been merely the affirmance of orders, and yet each case had to be and was remitted to the lower court for further proceedings. Counsel for defendant call attention to three cases in which orders granting new trials were affirmed. In two, *Bearrs v. Sherman,* 56 Wis. 55, 13 N. W. 869, and *Smith v. Champagne,* 72 Wis. 480, 40 N. W. 398, the mandates were, "The order of the circuit court is affirmed, and the cause remanded for further proceedings according to law," while in the third, *Allen v. Milwaukee,* 72 Wis. 182, 39 N. W. 347, the mandate was merely "Order affirmed." If the mandate, applying it to the case in which it is made, necessitates a new trial or further proceedings, then such is the judgment or order of this court irrespective of the fact that the words "and the cause is remanded for further proceedings according to law," or their equivalent, are omitted.

It could not have been the legislative intent to make the necessity for further proceedings within the year depend upon the particular form of mandate used. To infer that is to infer that the legislature left it for this court to determine whether or not further proceedings were to be taken within the year. It did not do so. It was the legislative intent to expedite all cases in which, by force of the judgment or order of this court, further proceedings are necessary.

But it does not follow that because the order of the circuit court was based upon an erroneous conclusion it must therefore be reversed. If it can be sustained upon another ground it must be affirmed.

The statute quoted is both drastic and mandatory. *Whereatt v. Ellis,* 85 Wis. 340, 55 N. W. 407; *Christianson v. Pioneer F. Co.* 101 Wis. 343, 77 N. W. 174, 917; *State ex rel. Mitchell v. Johnson,* 105 Wis. 90, 80 N. W. 1104. But it has been held that the party for whose benefit it was enacted may by his conduct waive its provisions. In *Whereatt v. Ellis,* 85 Wis. 340, 55 N. W. 407, such waiver consisted in the party invoking the aid of the statute having paid the clerk's fees, procured a return of the record, and taking proceedings inconsistent with his claim that he was entitled to a dismissal. In *Raymond v. Keseberg,* 98 Wis. 317, 73 N. W. 1010, there was held to be a waiver because defendant, who asked for a dismissal, had procured a return of the record, taken part in negotiations for a settlement lasting till too late to try the case within the year, and had accepted and retained costs before the new trial began. In the present case there had been mutual accommodations granted to or promised for the attorneys of both parties; some vague negotiations for an adjustment of the case had been considered; and it is shown by fairly persuasive proof that plaintiff's health was such, due to the accident, that it was not prudent to try the case earlier. But in addition to all this it appears that on December 23, 1913, plaintiff noticed the case for trial. True, defendant's then attorney refused to accept service for the reason that he thought defendant would insist upon a motion for dismissal on the ground that the case had not been retried within the year. But defendant made no such motion till the case was called for trial on February 3, 1914. In the meantime, by his failure to seasonably move for the dismissal of the case, he induced and compelled the plaintiff to prepare for trial and to have her witnesses there when the case was called, thus requiring her to incur labor and expense. A party desiring to take advantage of the statute must do so seasonably. If he unreasonably stands by and causes the other side to incur expense which might be saved if he acted with reasonable promptness,

he must be deemed to have waived the provisions of the statute. In the present case we affirm the order refusing to dismiss the case upon the ground of unreasonable delay in making the motion to dismiss.

The verdict in the present case had the approval of the learned trial judge. Ordinarily under such circumstances it ought not to be disturbed on appeal except in a clear case of error. *Murdock v. B., D. L. & J. R. Co.* 147 Wis. 100, 132 N. W. 979. For the purpose of determining how conscientiously a jury has sought to discharge its duty the whole verdict may be scanned, and the answers to the several questions, though none of controlling importance, may shed considerable light on the inquiry as to the presence or absence of bias on its part. In the present case the jury find, and are justified in finding, that when the automobile was about ten feet from plaintiff she first saw it and became startled and ran in front of it. It is clear that what may be termed an emergency situation existed or was thought to exist by both parties when plaintiff first moved north in front of defendant's automobile. Under such circumstances a person is not held to the strict exercise of ordinary care, for there is no time for the exercise of judgment and deliberate action upon it. The evidence showed that from the time defendant first saw plaintiff till she was struck not more than ten seconds elapsed. Less than half of this was taken up by the attempts of each to avoid the other. In such situations action is instinctive rather than deliberate, and for that reason a failure to take the best means of escape is not necessarily negligence. The jury properly applied this rule to plaintiff in answers to questions 2 and 9. Why they did not give defendant the benefit of it in answers to questions 3 and 4 is not apparent. It cannot be on the ground that defendant showed any lack of diligence to avoid the collision, for as soon as plaintiff ran north he turned southeast to go behind her, and would have done so had she not immediately run south again

right in front of his car. When she did that he at once tried to stop and avoid her by heading his car north. He failed to clear her. The right fender of the car struck her, and the car was stopped within two feet of where she was struck. In the great majority of cases of impending collisions a person about to inflict injury is as anxious to avoid it as the person about to be injured. We find nothing in the evidence indicating a different condition in the present case.

As evincing the length to which the jury was willing to go in order to find favorably for plaintiff, the answer to question 8 serves as a good example. That question read: "Would a person of ordinary care have anticipated that as a result of moving to the south in front of the automobile, under the circumstances shown by the testimony, that a collision with the automobile would probably result?" The jury answered "No." The circumstances shown by the evidence are that when plaintiff stepped south in front of the automobile it was moving to the east or southeast, and that she was only a few feet from it when she stepped in front of it. One might as well give a negative answer to the question, "May one reasonably anticipate a collision with a moving automobile by suddenly stepping immediately in front of it?" These answers of the jury are adverted to for the purpose of showing that the present verdict, though approved by the trial court, has inherent evidences of bias if not actual perverseness. They therefore have a bearing upon the value of the jury's answer to question 1, where they find that the defendant, in the exercise of ordinary care in taking the line he took to pass to the north of plaintiff, ought to have anticipated that plaintiff would become startled and probably move in front of his automobile. While this question is not the exact equivalent of an inquiry as to whether defendant was negligent in taking the course he did, we shall treat it as such, or rather we shall inquire and determine if defendant was negligent in attempting to pass in front of plaintiff.

When he first saw her he was about in the center of Sixth avenue, where the south line of National avenue, exclusive of the sidewalk space, intersects it. She was then standing two or three feet south of the south rail of the south track on National avenue in a line with the east sidewalk on Sixth avenue. She was about twenty-five feet east of him and about fifteen feet north of him, standing waiting for an east-bound car. He wanted to go east on National avenue about 100 feet to Lederer's butcher shop and so continued in a northeasterly direction at a speed not exceeding six miles an hour, taking such a course that had plaintiff stood still he would have cleared her from three to seven feet. There is that variance in the estimates of the different witnesses.

It would seem to us that if a person could ever legitimately indulge in a presumption that a woman does not intend to move forward and upon a street-car track it is when she is standing beside the track waiting for an approaching car that is within half a block of her. Defendant saw that by proceeding at the speed he did he could pass to the west and north of plaintiff and on the side towards which she was looking and get out of the way before the street car reached her. She was a mature woman and it was broad daylight. The approach of an automobile in front of her at a speed of only six miles per hour and driven by a grown man could not reasonably be anticipated to frighten her. Quite a different case would present itself were the speed of the automobile considerably greater. Six miles per hour on a smooth street is a slow speed for a car—a speed at which it is under perfect control, and but for the unexpected conduct of plaintiff defendant would have passed her unharmed. Many prudent chauffeurs deem it safer to pass in front than behind persons standing in the street. By so doing they pass in the line of vision of the persons standing and are less likely to frighten them, even though they come closer. Defendant had every reason to believe that from the time he entered National avenue he was within the line of vision of plaintiff where she

stood waiting for the approaching car. He took a course that in all probability seemed to be outside of where she would be likely to be or go and yet where she would see him. That the fact turned out to be otherwise does not alter the case. He cannot be charged with prescience nor with reasonable anticipation of possible, but only of probable, results. Notwithstanding the approval of the verdict by the trial court, we have reached the conclusion that the evidence failed to establish any negligence on the part of the defendant.

By the Court.—Judgment reversed, and cause remanded with directions to dismiss the complaint upon the merits.

The respondent moved for a rehearing.

In support of the motion there was a brief by *Otjen & Otjen,* attorneys, and *James T. Drought,* of counsel, and in opposition thereto a brief by *Lorenz & Lorenz,* attorneys, and *James D. Shaw,* of counsel.

The motion was denied, with $25 costs, on June 1, 1915.

STATE EX REL. MANITOWOC GAS COMPANY, Respondent, vs. WISCONSIN TAX COMMISSION and others, Appellants.

April 13—June 1, 1915.

Taxation: Constitutional law: Incomes and property distinct: Limitations on taxing power: Incomes of nonresidents: Situs: "Derived from sources within the state:" Interest on corporate bonds: Action to question validity of tax: Parties: When partial invalidity avoids whole tax.

1. Under sec. 1, art. VIII, Const., as amended, the taxation of property and the taxation of incomes are to be considered as two separate and distinct things.
2. The taxing power of a state does not extend beyond its territorial limits, but within such limits it may tax persons, property, incomes, or business.
3. If an interest in property is taxed, the situs of either the property

or interest must be found within the state. If an income be taxed, the recipient thereof must have a domicile within the state or the property or business out of which the income issues must be situated within the state so that the income may be said to have a situs therein. [Whether an income may have a situs for taxing purposes different from that of its recipient is not determined.]

4. The situs of the security for a debt is not necessarily the situs of the evidence of the indebtedness.
5. The Income Tax Law does not seek to reach property or an interest in property as such, but to reach incomes having a situs within the state or growing out of a privilege exercised or occupation conducted within the state, and sub. 3, sec. 1087*m*—2, Stats. 1911, levying an income tax upon nonresidents "upon such income as is derived from sources within the state or within its jurisdiction," must be construed to mean such income as issues directly from property or business located within the state, and not income from loans made therein, though secured by a trust deed upon property situated within the state.
6. The purchase of a bond issued by a domestic corporation is the making of a loan of money to the obligor; its purchase by a nonresident does not constitute any business carried on within the state, and its situs remains at the domicile of the bondholder. Interest on such a bond, paid to a nonresident, is therefore not income "derived from sources within the state," within the meaning of sub. 3, sec. 1087*m*—2, Stats. 1911.
7. A corporation whose property was by sub. (b), sec. 1087*m*—3, Stats. 1911, made liable for the income tax upon the interest paid to its bondholders if the latter failed to pay such tax, may maintain an action questioning the validity of the tax.
8. Where a part of a tax is invalid and the amount of the illegal portion is not capable of ascertainment, the whole tax fails.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

This action involves the construction of sub. 3 of sec. 1087*m*—2, Stats. 1911, which provides that an income tax "shall be assessed, levied and collected upon all income, not hereinafter exempted, received by every person residing within the state, *and by every nonresident of the state* upon such income as is derived from sources within the state or within its jurisdiction." In 1913 the *Wisconsin Tax Commission* assessed against the bondholders of the relator an income tax

of six per cent. upon $11,575, which was the amount of interest paid by it to them during the year 1911. It is stipulated between the parties that a portion of the bondholders to whom relator paid such interest were nonresidents of the state.

The trial court reversed and set aside the action of the *Tax Commission* on the ground that sub. 3 of sec. 1087*m*—2, Stats. 1911, in so far as it authorizes the assessment of a tax against relator's bondholders for interest paid by it to them, which tax is by sub. (b), sec. 1087*m*—3, made a lien prior to all other liens upon the property and business of the relator, and unless paid by said bondholders requires payment thereof to be enforced out of the property of the relator, is unconstitutional and void. From a judgment accordingly the defendants appealed.

For the appellants there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

For the respondent there was a brief by *Nash & Nash,* and oral argument by *E. G. Nash.*

A brief was also filed by *Olin, Butler, Stebbins, Curkeet & Stroud* supporting the contentions of the respondent, and the cause was argued orally by *H. L. Butler.*

VINJE, J. The *Income Tax Cases,* 148 Wis. 456, 503, 134 N. W. 673, 135 N. W. 164, dealt with only those provisions of the Income Tax Act which if declared void might invalidate the whole law. Matters of detail or the consideration of separate parts, the invalidity of which would not affect the whole law, were left for future determination. The present question belongs to the latter class. It involves the construction of that part of the law taxing nonresidents upon "such income as is derived from sources within the state or within its jurisdiction," being sub. 3 of sec. 1087*m*—2, Stats. 1911.

Our constitution originally provided that "the rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe." To this was added by the amendment of 1908: "Taxes may also be imposed on incomes, privileges and occupations, which taxes may be graduated and progressive, and reasonable exemptions may be provided." Sec. 1, art. VIII. It was stated in the *Income Tax Cases, supra,* that the constitution as amended clearly recognizes the idea that the taxation of *property* and the taxation of incomes are two separate and distinct things. In taxes upon property the rule of taxation must be uniform, while taxes upon incomes may be graduated and progressive. It may be conceded that, logically and philosophically considered, all taxes are ultimately derived from property or labor and paid in property. But as was said in *Van Dyke v. Milwaukee,* 159 Wis. 460, 463, 464, 150 N. W. 509, philosophical and logical distinctions must yield to the clearly expressed intent of the written law and to the possibility of a practical administration thereof. The constitution divides the subjects upon which taxes may be levied into two classes, one property, the other incomes, privileges, and occupations. The supreme law of the state having so divided them, and there being nothing in such division contrary to a valid classification or to the federal constitution, courts must respect the division and administer the law as written. *Income Tax Cases,* 148 Wis. 456, 503, 134 N. W. 673, 135 N. W. 164.

The taxing power of a state does not extend beyond its territorial limits. *Union R. T. Co. v. Kentucky,* 199 U. S. 194, 26 Sup. Ct. 36. Within such limits it may tax persons, property, incomes, or business. *State Tax on Foreign-held Bonds,* 15 Wall. 300. If the tax be on property, it, or its lawfully constituted situs, must be found within the state. If an interest in property is taxed, the situs of either the property or interest must be found within the state. If an

income be taxed, the recipient thereof must have a domicile within the state or the property or business out of which the income issues must be situated within the state so that the income may be said to have a situs therein. Whether an income may have a situs for taxing purposes different from that of its recipient is not determined. But assuming that it can, did the income in question have a situs in this state?

The bondholders as such were individually sought to be taxed. They were creditors of the relator, and a portion of them resided outside the state. The nonresidents as bondholders owned no property and conducted no business within its borders and had no domicile here. True, their debt was secured by property within the state, but the situs of the security for a debt is not necessarily the situs of the evidence of the indebtedness. The Income Tax Law does not seek to reach property or an interest in property as such, but to reach incomes having a situs within the state or growing out of a privilege exercised or occupation conducted within the state. The law levying an income tax upon nonresidents "upon such income as is derived from sources within the state or within its jurisdiction," must be construed to mean such income as issues directly from property or business located within the state, and not income from loans made therein, though, as here, secured by a trust deed upon property situated within the state. The situs of the property out of which such income issues is that of the domicile of the creditor. *State Tax on Foreign-held Bonds,* 15 Wall. 300. The purchase of a bond is the making of a loan of money to the obligor. The bond represents so much money due from the debtor. The purchase of it does not constitute any business carried on within the state. The situs of a bond remains at the domicile of the bondholder. So the interest in question did not, as to nonresident bondholders, constitute an income derived from sources within the state within the meaning of sub. 3 of sec. 1087*m*—2, Stats. 1911.

In all cases cited by the attorney general the tax was levied upon property or an interest in property as such, as, for instance, a tax upon the interest of a mortgagee in the mortgaged premises (*Savings & L. Soc. v. Multnomah Co.* 169 U. S. 421, 18 Sup. Ct. 392); or a tax upon shares of stock at the situs of a corporation (*Delaware Railroad Tax,* 18 Wall. 206); or a tax upon shares of stock at the domicile of the stockholder (*Hawley v. Malden,* 232 U. S. 1, 34 Sup. Ct. 201). All such cases, while interesting and instructive upon property taxation, are not particularly helpful in settling the situs of an income tax. Even a tax on the income of real estate or of personal property, though declared in *Pollock v. Farmers' L. & T. Co.* 158 U. S. 601, 15 Sup. Ct. 912, to be a direct tax within the meaning of the federal constitution, requiring such taxes to be apportioned according to population, is not, where included in an income tax, a direct tax upon property as such. Our income tax is a burden laid upon the recipient of the income whether derived from real estate, personal property, or labor, the amount of which is determined by the amount of the total net income derived from these sources, singly or combined. It is a toll taken from the fruits of property and labor in proportion to the net value of the harvest. Such toll is property, and so is the fruit of property and labor. But as before stated, since the constitution has lawfully classified the subjects of taxation into that of property and incomes, the distinction must be observed by the courts, though logically both classes constitute property.

The essence of the constitutional amendment authorizing income taxation is that that part of property constituting income shall be separately and differently taxed from all other property. There is nothing unlawful or inconsistent in such a classification.

The state makes the contention that the relator has no right to prosecute the action because the tax is not levied against it but against the bondholders. The tax, however, if not paid by them, is made a specific lien upon the relator's property

prior to all other liens. Sub. (b), sec. 1087*m*—3. This fact gives the relator a sufficient interest in the subject matter of the action to maintain it.

The result arrived at is that, as to the nonresident bondholders, the income sought to be taxed was not derived from sources within the state within the meaning of the Income Tax Law of 1911. Hence, assuming such law to be constitutional, the tax upon them was nevertheless illegal. Since the amount of the illegal portion is not capable of ascertainment the whole tax fails. It follows that the judgment must be affirmed, but upon a different ground than that upon which the trial court based it.

By the Court.—Judgment affirmed.

HOTT, Respondent, vs. WEST ALLIS IRON WORKS, Appellant.

May 4—June 1, 1915.

Master and servant: Action for services.

In an action to recover for services, a judgment for plaintiff in the civil court, affirmed by the circuit court, is *held* to be sustained by the evidence.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

F. C. Weed, for the appellant.

For the respondent there was a brief by *Thomas A. Manning,* attorney, and *Wheeler & Witte,* of counsel, and oral argument by *Mr. Manning.*

KERWIN, J. This action was commenced in the civil court of Milwaukee county to recover for services performed by plaintiff for defendant, and judgment was entered in favor of the plaintiff for $58.35, which judgment on appeal to the circuit court was affirmed.

The court below rendered a decision in writing holding that the evidence was sufficient to support the decision of the civil court and that the conclusions arrived at by the civil court were correct, and affirmed its judgment. We agree with the court below and think the judgment should be affirmed.

By the Court.—Judgment affirmed.

STATE EX REL. GURNEY LUMBER COMPANY vs. RISJORD, Circuit Judge.

May 4—June 1, 1915.

Payment: Where and how to be made: Custom and usage: Corporations located in different counties: Repair work: Remittance by mail: Action: Where cause of action arises: Place of trial.

1. Where a contract for the payment of money is silent as to the place of payment, in the absence of any legitimate inferences to the contrary the law implies that payment shall be made at the residence, office, or place of business of the creditor, if within the state.
2. Payment by mail remittance is not such an established and generally recognized usage of trade that by implication it becomes part of a contract for the repair in one county of a machine owned by a corporation having its place of business in another county.
3. Where a machine was repaired by a domestic corporation in the county where it had its place of business and was there delivered to the owner, a corporation having its place of business in another county, the cause of action for labor and materials furnished arose at the time and in the county of such delivery, in the absence of any agreement or any recognized custom of business between the parties to the contrary; and the action is therefore properly triable in that county under sub. 5, sec. 2619, Stats.

MANDAMUS to the Hon. G. N. RISJORD, Judge of the Circuit Court for Ashland county. *Writ quashed.*

The Bretting Manufacturing Company is a corporation organized and existing under the laws of the state of Wisconsin,

having its place of business in the city of Ashland, Ashland county, Wisconsin. The relator, the *Gurney Lumber Company,* is a corporation organized and existing under the laws of the state of Wisconsin and has its place of business at Gurney, in Iron county, Wisconsin. The Bretting Manufacturing Company did repair work on a locomotive of the *Gurney Lumber Company.* These repairs were made at its shops in the city of Ashland. After the locomotive had been repaired it was delivered to the *Gurney Lumber Company* in the city of Ashland. The *Gurney Company* has not paid the bill for repairs. The Bretting Manufacturing Company commenced an action against the *Gurney Lumber Company* to recover the amount due for such labor and material. The action was commenced in the circuit court for Ashland county. The *Gurney Company* served notice upon the Bretting Manufacturing Company demanding a change of venue to the circuit court for Iron county. The Bretting Company did not consent to such demand for the change of the place of trial of the case. On the 31st day of March the relator obtained an order to show cause in the Ashland county circuit court to secure such change of venue of the action. After the hearing of said order the court made an order denying the application.

This is an application to this court to compel by *mandamus* the judge of the circuit court for Ashland county to change the venue in the action of the Bretting Manufacturing Company against the relator, the *Gurney Lumber Company,* from Ashland county to Iron county.

For the plaintiff there was a brief signed by *A. L. Ruggles,* attorney, and *Sanborn, Lamoreux & Pray,* of counsel, and oral argument by *B. H. Stebbins.*

For the defendant there was a brief by *William F. Shea,* and oral argument by *B. W. Jones.*

SIEBECKER, J. It appears that the relator is a Wisconsin corporation and that it has its principal office and place of

business at Gurney, Iron county, and that the plaintiff is likewise a domestic corporation with its office and place of business at the city of Ashland. The alleged services and the material furnished, for which compensation is demanded, were performed and furnished at the relator's request and the plaintiff delivered the locomotive on which the repairs had been made to the relator at Ashland.

The provisions of sec. 2619, Stats. 1913, govern the rights of the parties as regards the question presented for determination. The portion of the statute applicable here is: "Fifth. Of an action against any other corporation existing under the law of this state, the county in which it is situated or has its principal office or place of business, or in which the cause of action or some part thereof arose." The question here is, In which county did the cause of action alleged in the complaint of the Bretting Manufacturing Company arise? It is contended by the relator that it arose in Iron county. This claim is made upon the ground that the *Gurney Lumber Company* had the right to pay the demand sued for by a remittance by mail addressed to the Bretting Company at the Ashland postoffice, and that the cause of action sued on did not, under these circumstances, arise until the relator failed to so mail a remittance at Gurney, Iron county. The argument is made that the rule stated in *State v. Kenosha Home Tel. Co.* 158 Wis. 371, 148 N. W. 877, namely, "where a contract for the payment of money is silent as to the place of payment, in the absence of any legitimate inferences to the contrary the law implies that payment shall be made at the residence, office, or place of business of the creditor, if within the state," does not govern in the instant case. It is asserted that it is the well recognized custom or usage in the conduct of business that payment of a claim of this kind, arising under the circumstances of the transaction between these parties, is usually and customarily made by a remittance by mail of a check or some other form of bank paper equivalent to

money. The facts of the case do not show that the parties had agreed that payment of the claim was to be made by remittance by mail. Nor does it appear that plaintiff had given any special authority to relator to so remit or that there existed between these parties a custom of transacting their business in that manner. The cases of *Burr v. Sickles,* 17 Ark. 428; *Morton v. Morris,* 31 Ga. 378; *Morgan v. Richardson,* 13 Allen (95 Mass.) 410; and others cited to our attention do not sustain the contention that payment by remittance by mail is such an established and generally recognized usage of trade that it is implied and becomes part of contracts of the kind involved here. The effect of these decisions goes no farther than to hold that such remittances are a recognized method of payment if it appears that the parties to the transaction had such a recognized course of business or an understanding to that effect. All of these elements are wanting in this case. We are of the opinion that the rule declared in the *Kenosha Case* governs and controls the parties to this controversy. No time of payment having been fixed by agreement of the parties, the law fixes it at the time of delivery of the locomotive at Ashland, Wisconsin. 35 Cyc. 262. The court properly denied the application for a change of venue of the action. The relation states no cause for issuing a peremptory writ of *mandamus.*

By the Court.—Judgment is ordered quashing the writ; the respondent to recover $25 attorneys' fees and the clerk's fees in this court.

OSHKOSH WATER WORKS COMPANY, Appellant, vs. RAILROAD COMMISSION, Respondent.

May 5—June 1, 1915.

Public utilities: Purchase by cities: Valuation: Elements of value: Investment: Earnings: Going value: Reproduction cost: Water pipes laid before paving: Decision by railroad commission: When set aside: Action: Finding by court: Burden and degree of proof: Outstanding bonds: Premium: Order for payment: Taxes assessed before purchase, by whom payable: Constitutional law: Provision for annual tax: Harmless error.

1. In the valuation of a public utility for condemnation or sale purposes, the essential elements usually to be considered are the present value of its physical property, the present and prospective reasonable earnings of its business, the going value thereof, and the amount of money presently needed to put the plant in good condition.
2. In determining the value of the physical property due regard should be had to the original cost thereof, the reproduction cost, the amount of depreciation, and the amount of obsolescence.
3. The "going value" of a utility is that part of its value due to its having an existing established business. In fixing its amount the actual cost of establishing the utility in question as modified by what under all the circumstances ought to have been its reasonable cost, as well as the reasonable cost of establishing like enterprises under similar conditions, may be considered.
4. Since the valuation of a utility cannot be reduced to absolutely fixed rules or to the mere appraisal of parts whose sum equals its value, but involves the exercise of sound and competent business judgment upon many elements of uncertain and debatable value, grave errors in arriving at and seriously affecting the final result must be shown before a valuation by the railroad commission will be set aside.
5. In determining the value of a utility a consideration of reproduction cost is profitable and proper only in so far as it will aid in determining the ultimate fact to be ascertained, namely, the just present value of the utility as an entity.
6. Generally, cost less depreciation will fairly represent value; for that reason cost is an important element in determining value, and reproduction cost is also important, but there may be elements that enter into both cost and reproduction cost that do not enhance value.

7. Thus, in determining the value of waterworks, the extra cost of reproducing under paved streets water pipes which were laid before the paving was done, was in this case properly disregarded.
8. The original investment is a valuable aid in determining the present value of a utility, but it is not controlling.
9. Earnings, if derived from a reasonable rate, are important factors in determining the value of a utility, but are not in themselves conclusive.
10. In an action under sec. 1797*m*—83, Stats. 1913, to review an order of the railroad commission fixing the compensation to be paid by a city for the taking of the property of a public utility, the finding by the trial court that the compensation fixed by the commission is "lawful" is a finding that it is just and adequate, and shows that the court passed upon the question of value as an original question of fact.
11. Under sec. 1797*m*—84, the compensation fixed by the commission must stand unless the plaintiff "shall establish to the full satisfaction of the court . . . that such compensation is unlawful," etc., and this does more than merely throw the burden of proof upon plaintiff, since it requires more than a preponderance of the evidence.
12. It is the property of a utility which is to be purchased by a city, not a mere equity of redemption therein; and where bonds secured by a trust deed of the property were outstanding when the compensation was fixed, but might be called at any time upon payment of a premium, and the compensation fixed was more than sufficient to pay the full amount of the bonds including the premium, the railroad commission properly ordered the company to call in and cancel the bonds and turn the utility over to the city free from all liens.
13. No rights of the bondholders being adversely affected by such order, they were not necessary parties to the proceeding.
14. The company in such a case is not entitled to receive the compensation without calling in the bonds. When it accepted an indeterminate permit it agreed to sell to the city at any time the latter might elect; and the city is under no obligation to assume the company's obligations or to pay anything more than the full value of the utility.
15. The property of a waterworks company being, under sec. 51.43 (p. 845) Stats. 1913, deemed personal property for purposes of taxation, the taxes thereon based upon the assessment made on May 1st were properly payable by the company, not by the city, although the city purchased the property and took possession thereof in the following October.

16. The provision of sec. 3, art. XI, Const., that a city acquiring a public utility shall provide for the collection of a direct annual tax to pay therefor, is for the protection of the utility; and when it appears that the city has the money on hand and has made lawful tender thereof to the utility, a noncompliance with the provision becomes a harmless error.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Action under sec. 1797*m*—83, Stats. 1913, to set aside an order of the *Railroad Commission* fixing the amount of compensation to be paid by the city of Oshkosh to the plaintiff for its property and the terms of payment. The plaintiff was granted a franchise June 18, 1883, to erect and maintain a system of waterworks in the city of Oshkosh. It operated under such franchise till January 18, 1910, when it voluntarily surrendered it for an indeterminate permit under the Public Utility Law (ch. 499, Laws 1907: secs. 1797*m*—1 to 1797*m*—109, Stats. 1913).

In 1902 bonds payable in twenty years and secured by a trust deed upon plaintiff's property were issued. The deed contains a provision that if plaintiff calls these bonds due it shall pay the bondholders a premium of seven and one-half per cent. upon the face of the same. At the time this action was begun such bonds to the amount of $424,000 were outstanding. In November, 1912, the city of Oshkosh voted to purchase the property of the plaintiff, and the *Railroad Commission* took jurisdiction of the matter as provided by sec. 1797*m*—82. On September 27, 1913, it filed an order providing:

"(1) That the just compensation to be paid to the *Oshkosh Water Works Company* for the taking of the property of said company, actually used and useful for the convenience of the public, by the city of Oshkosh, which property consists in the items above described, excepting, as stated, the stock and material on hand, and the additions to the plant that have been made since January 1, 1913, be and the same is

hereby fixed at five hundred and twenty-five thousand dollars ($525,000).

"(2) That in addition to the above compensation, the materials and supplies on hand at the date of the taking of the said plant and the new additions to the plant that have been made since January 1, 1913, be paid for by the said city of Oshkosh at such price as may be agreed upon by the parties themselves, or, in case the parties fail to agree upon the price, at such price as the *Commission* shall fix by supplemental order.

"(3) That the said city of Oshkosh pay to the said *Oshkosh Water Works Company* the compensation herein fixed, and the price of said materials and supplies and said additions to said plant, within six months of the date hereof, with interest at the rate of six per cent. per annum from the date of taking possession of said plant by said city until the same is fully paid."

To review such order the plaintiff brought this action in the circuit court for Dane county pursuant to sec. 1797*m*—83. The trial court found as facts: "(1) That on September 27, 1913, the above named defendant, in a proceeding duly had before said *Commission,* fixed the sum of $525,000 as the fair compensation to be paid by the city of Oshkosh to the plaintiff, as the owner of the Oshkosh waterworks, for the property of the plaintiff used and useful in supplying the city of Oshkosh and its inhabitants with water. (2) That the compensation so fixed by said *Commission* is lawful, that the terms and conditions of the sale fixed by said *Commission* are reasonable, and that none of said terms and conditions are unreasonable."

As a conclusion of law the court found: "That judgment be entered confirming the award of the *Commission,* that neither party recover costs, but that plaintiff pay the fees of the clerk of the above entitled court."

From a judgment entered accordingly the plaintiff appealed.

For the appellant there was a brief by *Kreutzer, Bird,*

Rosenberry & Okoneski, attorneys, and *John M. Olin,* of counsel, and oral argument by *Claire B. Bird.*

For the respondent there was a brief by the *Attorney General* and *Walter Drew,* deputy attorney general, attorneys, and *R. A. Hollister,* corporation counsel for the city of Oshkosh, of counsel, and the cause was argued orally by *Mr. Drew, Mr. H. I. Weed, Mr. Hollister,* and *Mr. E. J. Dempsey.*

VINJE, J. The validity of the judgment is challenged (1) because it failed to adjudge that the sum of $525,000 is less than just compensation for the taking of the property appraised; (2) because the trial court should have passed upon the question of value as an original question of fact, giving the decision of the *Commission* the effect of only casting upon plaintiff the burden of proof, if not already there; (3) because, construing the statute as the court did to authorize the appraisal of the whole property, the order should have been adjudged void for want of jurisdiction in the *Commission;* (4) because the *Commission* should have valued plaintiff's equity of redemption by itself and ordered its value paid unconditionally to the plaintiff, or (5) it should have made some other provision so that the plaintiff could obtain its money without being required to mature its bonds by paying a premium thereon, they being worth in the market not more than their face; (6) because the order did not provide for crediting plaintiff with the sum of $8,481.25 taxes levied against its property for the year 1913, the city having taken possession thereof October 4, 1913; and (7) because the order of the *Commission* should have fixed a time within which the city should be required to pay or provide for the payment of the money before it could take possession thereunder. The first four assignments of error attack the validity of the whole judgment, while the last three claim the order is unreasonable in not making the provisions mentioned and call only for a modification of the judgment.

In the proper valuation of a public utility for condemnation or sale purposes certain main elements usually present in every case may legitimately be considered. These are the present value of its physical property; the present and prospective reasonable earnings of its business; the going value thereof; and the amount of money presently needed to put the plant in good condition. There may be other elements, but these are generally the essential ones. In determining the value of the physical property due regard should be had to the original cost thereof; the reproduction cost; the amount of depreciation; and the amount of obsolescence. The going value of a utility is that part of its value due to its having an existing established business. In fixing its amount the actual cost of establishing the utility in question as modified by what under all the circumstances ought to have been its reasonable cost, as well as the reasonable cost of establishing like enterprises under similar conditions, may be considered. The element of going value is usually one whose quantum is not easily subject to mathematical demonstration. That in a measure is true of all the other elements of value. And it is equally true that the elements of value spoken of, or others if there be any, may not in their aggregate represent the just value of the utility. Such value may be more or less than the aggregate of the sum of the elements found. And it may be that some elements that enter into the main elements of value above stated should be entirely eliminated in fixing the just value of the utility as an entity. Its value must be fixed as such. *Chicago & N. W. R. Co. v. State,* 128 Wis. 553, 108 N. W. 557; *Appleton W. W. Co. v. Railroad Comm.* 154 Wis. 121, 142 N. W. 476. It is because the valuation of a utility cannot be reduced to absolutely fixed rules, or to the mere appraisal of parts whose sum equals its value, that the subject is one upon which honest and competent men differ. In the last analysis it is the exercise of a sound and competent business judgment upon many elements of uncertain and

debatable value considered as a business entity. Hence grave errors in arriving at and seriously affecting the final result must be shown before a valuation of the *Commission* can be set aside.

In the present case it is not claimed that the *Commission* did not take into account the main elements of value, but it is argued that an entirely inadequate amount was placed upon going value or else the *Commission* erroneously failed to consider an item of about $54,000 extra reproduction cost of laying pipes under pavements. In their decision the *Commission* present a table showing the cost of reproduction and the present value of the different groups into which they divide the plant. They find the reproduction cost to be $514,215 and the present value to be $453,547. These items include an item of $1,267 for reproduction cost of laying pipes under paving actually disturbed by the utility in laying their pipes, but do not include an item of about $54,000 reproduction cost of now disturbing paving over pipes laid before there was any paving. The *Commission* in discussing the table say:

"By including the reproduction cost and present value of all paving now existing over mains, whether disturbed or not, the cost of reproduction for the first six groups becomes $569,510, present value becomes $507,749. These of course must include allowance for overhead charges. The totals for the property therefore become $579,808 cost of reproduction, and $510,953 present value."

From this statement plaintiff argues that in fixing the value of the plant as an entirety the *Commission* placed a present value of $510,953 upon the physical property and hence allowed only the difference between such sum and the total valuation of $525,000 for going value, an entirely inadequate sum it is claimed. While the *Commission* included the reproduction cost of all paving in arriving at the stated present value of the plant, it does not follow that they ac-

tually included it in making their final award of the just value of the plant as an entirety. That they did not is probable from the fact that they do not include the sum of $54,000 in the table of reproduction cost set out in their opinion and from the fact that they say "paving is of relatively little importance in this case." An amount of $54,000 in a total valuation of $525,000 would not be relatively unimportant, while an amount of $1,267 would be so. But there is other language in the opinion of the *Commission* that renders it doubtful whether or not the item of $54,000 was omitted in arriving at the final award. In the concluding part thereof they say:

"The cost of reproduction of the physical property, excluding materials and supplies and nonoperating property, but including all paving now over mains, is $569,510, the corresponding present value $510,953. Bearing these facts in mind, as well as the present condition of the plant, the needed changes, its capitalized value on an unduly low depreciation rate, and also certain important features of the original franchise under which the company existed for most of its life, it is the judgment of the *Commission* that $525,000 represents fair compensation to the owners of the company for the property used and useful for the convenience of the public, regarding that property as an entity."

One thing is evident. The *Commission* either allowed $54,000 for reproduction cost of paving not disturbed and about $14,000 for going value in their final award, or else they disregarded the item of $54,000 and allowed about $68,000 for going value.

A consideration of reproduction cost is profitable and proper only in so far as it will aid in determining the ultimate fact to be ascertained by the *Commission,* namely, the just present value of the utility as an entity. If it is apparent that an evidentiary fact will not so aid the *Commission* or that it will lead to erroneous results, such evidentiary fact should be disregarded. Cost does not always equal value.

Neither does cost less depreciation always equal value. Generally cost less depreciation will fairly represent value. For that reason it is an important element in determining value. The reproduction cost is also important. But there may be elements that enter into both cost and reproduction cost that do not enhance value. The increased cost in a given case of producing a particular result may not add to the market value of such result. While it might cost $54,000 more to replace pipes under paved streets than under unpaved streets, pipes under paved streets would not be worth more for waterworks purposes than pipes under unpaved streets. It is doubtful if they would be worth as much owing to the lessened cost of making repairs on pipes laid in unpaved streets. The increased amount of business, if any, resulting from paved streets would manifest itself in the earnings of the company and would be properly considered in that item. It should not be twice considered.

In rate-making cases reproduction cost of laying pipes under pavement has been disregarded. *People ex rel. Kings Co. L. Co. v. Willcox,* 210 N. Y. 479, 104 N. E. 911; *Cedar Rapids G. L. Co. v. Cedar Rapids,* 144 Iowa, 426, 120 N. W. 966, affirmed in 223 U. S. 655, 32 Sup. Ct. 389; *Des Moines Gas Co. v. Des Moines,* 199 Fed. 204. The present reasonable value of the utility determines rate as well as price. In both the original investment is a valuable aid in determining the present value of the property, but it is not controlling. It is only one of several items to be considered in arriving at present value, whether for purchase or rate-making purposes. If the original investment was extravagant or if parts of the physical property have become obsolete, the public should not be required to pay on original cost either by way of rate or purchase. On the other hand, if the original investment was prudent and values have enhanced the utility should reap the benefit thereof both in rate and selling price.

An elimination of the item $54,000 results, as before

stated, in an allowance of about $68,000 for going value. Under the evidence such sum is reasonably adequate. If the *Commission* erred in allowing only $14,000 for going value, such error was cured by its allowance of $54,000 for reproduction cost of paving not disturbed. If it did not allow the $54,000 item, then it allowed $68,000 for going value. In either case the plaintiff was not prejudiced.

Some argument is made that the other items of physical property were unduly depreciated by the *Commission,* but we cannot say that the circuit court erred in affirming the findings made by it as to them. While it appears that the net earnings of the plaintiff are about $40,000 per year, it also appears that it would require upwards of $100,000 to put the plant in good condition. Earnings, if derived from a reasonable rate, are important factors in determining value. But like all other factors they are not in themselves conclusive. Upon the whole evidence we discover no valid ground for disturbing the valuation fixed by the *Commission* upon the property of the plaintiff as an entity and approved by the trial court.

It is urged that the trial court did not pass upon the question of value as an original question of fact, but merely held that the *Commission* had committed no error in its proceedings and so affirmed the award. In this counsel is mistaken. The first finding of the court recites that the *Commission* fixed $525,000 as the compensation to be paid the plaintiff for its waterworks system. The second finding is "that the compensation so fixed by the *Commission* is lawful." This finding is short, but it answers the legal call. In finding that the compensation fixed by the *Commission* was lawful the court found that it was just and adequate, else it could not be lawful.

The statute, sec. 1797*m*—84, however, does more than merely throw the burden of proof upon the plaintiff. Upon appeal from an order of the *Commission* the burden rests

upon him to establish "to the full satisfaction of the court" that the compensation fixed is unlawful. If he cannot so satisfy the court the compensation fixed by the *Commission* stands. Essentially the same provisions are contained in sec. 1797*m*—70. These statutory provisions require something more than a mere preponderance of the evidence to overthrow the findings of the *Commission*. The evidence of error must be "clear and satisfactory" or error must be established "to the full satisfaction of the court," in order to warrant it in declaring the findings unlawful. The statutory words used are so simple and expressive that attempted explanation thereof would serve only to confuse.

From the statement of facts it will be seen that bonds secured by a trust deed upon the property of the plaintiff were, at the time compensation was fixed, outstanding to the amount of $424,000. It is claimed that proper service upon the bondholders was not had and hence the *Commission* and the court had no jurisdiction of them. We shall not inquire into or determine whether or not the bondholders were properly served by the statutory publication, since they are not necessary parties to this proceeding. It appears that the plaintiff has the right to call in the bonds at any time by paying a premium of seven and one-half per cent. It further appears that the compensation fixed by the *Commission* is more than sufficient to pay the full amount of the bonds including the premium, and that the *Commission* required plaintiff to call in and cancel the bonds and turn over the utility free from all liens. This the plaintiff has a right to do and this the *Commission* can require to be done, and if this is done no right of any bondholder is in any way adversely affected. Each bondholder agreed that plaintiff might declare the bonds due at any time and have them canceled upon paying their face and premium. Since the order of the *Commission* operates only upon plaintiff and requires it to do no more than it has a perfect contract right with its bondholders to do, they are in no

wise concerned in the proceeding. Their rights are fully protected by the order made, and no rights of plaintiff are invaded by it.

The statute does not contemplate that a mere equity of redemption shall be valued by the *Commission* and purchased by the city. It is the property of the utility that is bought. *Green Bay & M. C. Co. v. Kaukauna G., E. L. & P. Co.* 157 Wis. 412, 147 N. W. 701. And where the compensation awarded is sufficient to pay up all existing liens and they are ripe for payment, they must be paid by the utility and the property turned over to the city freed from any and all outstanding claims.

What has already been said disposes of the claim that the *Commission* should have provided that plaintiff receive its money without calling in its bonds. When it accepted an indeterminate permit it agreed to sell to the city at any time the latter might elect, and it must then have contemplated that if the city did so elect before the bonds matured it would have to call them in. The city is under no duty to assume plaintiff's contract obligations. *Green Bay & M. C. Co. v. Kaukauna G., E. L. & P. Co., supra.* It is bound to pay only the just value of the utility. The fact that plaintiff has entered into a contract whereby it will cost it something to deliver the utility to the city cannot affect the reasonable value of the utility. The city is not concerned with the terms of settlement between the utility and its creditors so long as it receives the property free from liens. To require the city to pay the premium would be to require it to pay the bonus plaintiff agreed to pay for the use of money. Municipalities have nothing to do with past obligations incurred by the utility except in so far as they may be a lien upon the property bought. If they are, the utility must satisfy them out of the purchase price if that is sufficient to do so. That is all the *Commission* required in this case.

The city levied the sum of $8,481.25 taxes on plaintiff's

property for the year 1913 on a valuation of $500,000. On October 4, 1914, by stipulation between the parties, it took possession of the plant as of October 1, 1913. It is claimed the city should pay the taxes for the year 1913. Except as provided in sec. 1040, Stats. 1913, all personal property shall be assessed as of the first day of May in each year. Sec. 1033, Stats. 1913. This property does not fall under the exception. By sec. 51.43 (p. 845) Stats. 1913, it is deemed personal property for the purpose of taxation. Sub. 8, sec. 1040, provides that no change in location or sale of any personal property after the first day of May in any year shall affect the assessment in such year. The tax was a debt of the plaintiff incurred before the award was made, and the *Commission* properly held it was payable by plaintiff. *Green Bay & M. C. Co. v. Kaukauna G., E. L. & P. Co.* 157 Wis. 412, 147 N. W. 701; *Allen v. Greenwood,* 147 Wis. 626, 133 N. W. 1094; *Bogue v. Laughlin,* 149 Wis. 271, 136 N. W. 606. The statutory provision requiring a tax on personal property to be paid by one who owns it May 1st, though a sale is made thereafter, works no inequity. Up to the time of sale he has the property—after that the purchase price, presumably equal to the value of the property.

The last claim made is that the order of the *Commission* is unreasonable because it did not require the city to pay or provide the means of payment before it took possession of the plant. This objection, under the facts shown, has now no merit. It appears that on March 27, 1914, and within the six months fixed by the *Commission* the city duly tendered plaintiff the sum of $552,926.18, being the amount of the award of $525,000 and $11,821.53 agreed upon for additions and supplies, with interest on both sums from October 1, 1913, at six per cent. It also appears that such tender has at all times since been kept good. As pointed out in *Janes v. Racine,* 155 Wis. 1, 143 N. W. 707, the provision of sec. 3, art. XI, Const., that a city acquiring a public utility shall

provide for the collection of a direct annual tax to pay therefor, is for the protection of the utility. When it appears, as it now does, that the city has the money on hand and has made lawful tender thereof to the utility, a noncompliance with the provision becomes a harmless error.

By the Court.—Judgment affirmed.

HUBER, Respondent, vs. SEEGER and husband, Appellants.

May 5—June 1, 1915.

Husband and wife: Liability of wife for torts: Bills and notes.

A married woman is responsible for a tort committed by her when not under coercion by her husband, and may give a valid note in settlement of an action brought against her therefor.

APPEAL from a judgment of the circuit court for Ozaukee county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

W. J. Kershaw, for the appellants.

James D. Shaw, for the respondent.

WINSLOW, C. J. In an action upon a promissory note given by the defendant *Mathilda Seeger* and her husband jointly, in consideration of the settlement and discontinuance of a slander action brought by plaintiff against her and then pending, the defendants pleaded duress and fraud, but the court found on sufficient evidence that neither duress nor fraud existed and entered judgment for the plaintiff.

A married woman is responsible for a tort committed by her when not under coercion by her husband (*Jones v. Monson,* 137 Wis. 478, 119 N. W. 179) and she may doubtless give a valid note in settlement of an action brought against her therefor. The judgment must be affirmed.

By the Court.—It is so ordered.

SAYLES and others, Respondents, vs. CITY OF HARTFORD and others, Appellants.

May 5—June 1, 1915.

Municipal corporations: Public improvements: Sewers: Special assessments: Restraining enforcement: Adoption of part of general charter: Validity: Limitation of actions: Statutes construed: Taxpayers' action: Protection of individual rights of parties: Judgment construed and restricted.

1. Special assessments for public improvements cannot be levied upon private property unless by legislative authority and unless the prescribed method be followed in all substantial particulars.
2. A city incorporated by special act may adopt substantially the whole of the general charter plan relating to sewers (subch. XX, ch. 40*a*, Stats.), but has no power to adopt less.
3. Sec. 926—15, Stats.,—providing that in cities of the third and fourth classes where the whole or any part of the cost of a sewer is to be paid by special assessments, certain proceedings shall be had,—does not contain a grant of power, but is a mere regulation of the exercise of power where it already exists.
4. Sec. 926*a*, Stats.,—providing that no assumed adoption of the whole or any part of the general charter law shall be called in question or held invalid except in an action or proceeding brought directly for that purpose within three months after such assumed adoption,—relates to defects in the exercise of power, but does not apply where, as in this case, there is an absolute want of power.
5. A general taxpayers' action to enforce the right and duty of a city to refuse to pay public money upon an illegal contract for improvements may be maintained even though some of the plaintiffs have, by their conduct or laches, estopped themselves from asking relief as to their private rights.
6. If no estoppel is shown, the court may in such action deal with and protect also the individual rights of the parties to the record; but it should not restrain enforcement of special assessments against property of persons not before the court, and a judgment in general terms affecting such assessments may be construed and restricted so as not to apply to private property other than that of the parties.

APPEAL from a judgment of the circuit court for Washington county: MARTIN L. LUECK, Circuit Judge. *Modified and affirmed.*

Taxpayers' action to test a contract for constructing a sewer in the city of *Hartford,* Wisconsin.

The issues are indicated by the following trial determination:

January 16, 1912, the common council of the city of *Hartford,* Wisconsin, passed an ordinance, in form, adopting secs. 925—208 to 925—222, inclusive, and secs. 925—230 to 925—232, inclusive, Statutes of Wisconsin.

April 3, 1912, said council divided said city into two sewer districts.

February 6, 1912, said council, by resolution, made its members a committee on sewerage with the powers of a board of public works.

February 6, 1912, said council provided, by resolution, for publishing a notice of a plan for constructing a sewerage system for said city, prepared as per resolution of June 6, 1911, and open to inspection at the office of the city clerk; interested persons to have thirty days after the first publication to examine such plans and file objections, and council to hear such objections March 11, 1912, at 7:30 o'clock, at the council chamber.

Neither the suggested plan nor any other was adopted by such committee nor any one authorized to perform the duties of a board of public works.

No report was made by such committee of the sewers advisable to be constructed during the ensuing year nor as to constructing any particular sewer.

October 25, 1912, said council, by ordinance adopted under suspension of the rules, provided for construction, under the supervision of said committee, of some portions of the particular sewer. Subsequent to such action a call was made for sealed proposals to furnish the material and construct such portions of the sewer.

Mulholland, Kuehn & Co. and *A. C. Schreiter* put in bids, that of the former being the lowest and they being responsible bidders and competent to do the work involved. The council,

acting in good faith, awarded the contract to the last named bidder.

A contract was made, in form, accordingly, but there was no city attorney nor comptroller to act in the matter.

The agreement provided for payments to be made to contractors in assessment certificates so far as there were such available therefor; but no assessments had theretofore been made to provide a basis for such certificates.

February 27, 1913, such committee gave notice that it would make assessments against lots abutting on the streets where the sewer was to be put in and that objections thereto would be heard by such committee at a time and place specified. Pursuant thereto such committee met to hear objections but none were made and the committee adjourned without action.

March 18, 1913, at a meeting of the common council said committee reported the facts as aforesaid.

The assessments by such committee, claimed to have been adopted by said council March 18, 1913, were according to the frontage of each lot or part of lot or parcel of land abutting on the street regardless of whether there was any sewer construction in front thereof or not. There was 100 feet of the street in front of property in which plaintiffs were interested in which there was no sewer construction, nevertheless said council proposed to issue sewer improvement certificates in respect thereto.

In June, 1913, the contractor threatened to begin executing his contract in front of plaintiffs' property, and unless prevented from so doing he would have proceeded and certificates would have been issued purporting to be a charge against such property.

On such facts the court concluded that the general charter scheme in its entirety, was not adopted by the city and, therefore, no part was validly adopted; leaving the city without power to build a sewer at the expense of abutting property.

Judgment was therefore rendered restraining the contractor

from constructing any part of the particular sewer, enjoining payment for any work in that respect, and issuance of improvement certificates for any such work or coercing property owners to pay taxes purporting to be evidenced by such certificates, and for costs.

John C. Russell, attorney, and *Ernst Merton,* of counsel, for the appellants.

For the respondents the cause was submitted on the brief of *Sawyer & Sawyer.*

MARSHALL, J. It is conceded that authority must be found in the written law for the proceedings which the trial court held to be invalid else the judgment must be affirmed, unless it is otherwise by principles of estoppel.

Public improvements cannot be legally made especially burdensome upon private property, in the absence of legislative authorization and the prescribed method being followed in all substantial particulars. Evidently the common council of appellant city supposed authority was conferred to do the acts complained of by adoption of the general charter scheme for constructing sewers. The trial court decided, as the fact is, that the city ordinance in respect to the matter only covered eighteen sections of the general city charter plan whereas there are thirty-eight of such sections; that the adoption proceedings came far short of an attempt to incorporate all of such plan into the written law of the city, and hence were void. Counsel for appellants make a very ingenious argument to show that error was thus committed, but the question is really not open to discussion.

The ordinance discloses, clearly, that there was no attempt to adopt the whole of the general charter plan; that very material parts thereof were omitted. The city had power to adopt substantially the whole, but none to adopt less. So ruled in *State ex rel. Boycott v. Mayor, etc.* 107 Wis. 654, 84 N. W. 242, and several subsequent cases.

The decision below was grounded wholly upon the infirm-

ity mentioned and want of authority otherwise to levy special assessments for sewer construction. We are unable to find that there was such authority. Our attention is called to sec. 926—15, Stats., providing that in cities of the third and fourth class where the whole or any part of the cost of a sewer is to be paid by special assessments, certain proceedings shall be had. . That does not contain a grant of power, but is a mere regulation of the exercise of power where it exists.

Several other sections of the statutes are referred to, but they all refer to methods subsidiary to and in furtherance of power where that exists by some written law.

It is suggested that sec. 926*a* places a limitation of three months after adoption proceedings on the right to judicial interference to challenge their validity, and limits the remedy to direct proceedings. If that term applies to this case it is fatal to respondents. It does not apply. It relates to defects in the exercise of power. The difficulty here is absolute want of power.

It is suggested that some of the plaintiffs have used some part of the sewerage system and thereby, in connection with delay with knowledge of the facts, estopped themselves from maintaining this action. The primary difficulty with that is, this is a general taxpayers' action to enforce the right and duty of the corporation to refuse to pay public money upon an illegal contract. Though a person were precluded by some such conduct as that referred to from use of a judicial remedy to prevent his property from being burdened by a special assessment, the court might still recognize him as competent to invoke judicial power to prevent illegal use of the public funds. *McGowan v. Paul,* 141 Wis. 388, 123 N. W. 253. A city cannot be estopped by laches of individual taxpayers, neither can all taxpayers of a city be estopped by the conduct of some of them. This action was to vindicate the right of the city as an entity and that of taxpayers in general. An individual taxpayer might take such a course as to be unworthy of recognition as standing for the municipality

or for all taxpayers; but there was no conclusive showing of that sort in this case.

Serious complaint is made because the judgment was extended so as to nullify certificates, if any existed, issued against respondents' abutting property and that of others not appearing and complaining. That concerns mere individual rights. However, we see no reason why the court could not properly deal with such rights as to the parties of record, notwithstanding the primary right involved is, as to them, as before indicated.

We are unable to see any clear case of estoppel from asking relief as to their private rights. They protested against the particular sewer being constructed at public expense, or partly that and partly at the expense of abutting property. As soon as it appeared that such protest would not be honored this action was commenced. Substantially no work had theretofore been done and none was done thereafter except what was necessary to restore the street. Respondents have occupied an adversary status from the first as to such particular sewer.

It may be that the judgment went too far in nullifying special assessments as to persons not actually before the court and complaining. They may have been willing to have their property burdened for the purposes of the sewer. Respondents answer that by saying that, no such certificates were issued and the judgment was not intended to prevent payment for work actually done nor interfere to prevent abutting owners from submitting to special assessment if they saw fit. With that concession it seems that the judgment should be so construed and restrained as not to go further than the proper scope of a taxpayers' action and to restrain enforcement of special assessments against the property of the persons before the court and complaining.

By the Court.—The judgment appealed from is construed and restricted as stated in the opinion, and as so construed and restricted it is affirmed.

BRUST and another, Appellants, vs. LAMOREUX and others, Respondents.

May 5—June 1, 1915.

Mechanics' liens: Architects: Continuity of service: Time for filing claim: Mortgages: Priority.

Architects were employed in 1908 to furnish plans for a dwelling, superintend the construction, and issue certificates for work performed thereon. The building was practically completed so that the owner moved into it in September, 1910. In 1912 the architects made a charge of $11.80 for a drawing, and in June, 1913, a charge of $9.90 for inspection of the heating plant, which had been in use since 1910, but had never been settled for nor formally approved. After said inspection a certificate for a certain amount was issued to the heating contractor, but no final certificate of approval of the heating plant was ever issued. *Held*, that the continuity of the service of the architects had been interrupted, that the owner had obviously accepted the building before June, 1913, and that any service rendered by the architects after such acceptance was not within the original contract of employment. They were therefore not entitled to a lien for services under that contract upon a claim not filed until October, 1913,—especially since the owner had in October, 1910, and again in August, 1913, mortgaged the premises to other persons.

APPEAL from a judgment of the circuit court for Dodge county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

This is an action to foreclose a mechanic's lien upon the interest in real estate of the defendant *D. P. Lamoreux* and wife. The defendants *Fitch* and *Zander* have mortgages upon this property.

In 1908 the plaintiffs were employed as architects by the defendant *D. P. Lamoreux* to furnish plans and superintend the construction of and issue certificates for work performed in and about the construction of a dwelling house to be erected upon the property of the defendant. This contract was a verbal one and entered into about the 1st day of July, 1908. The plaintiffs performed continuous services on this

building during 1908, 1909, and 1910. *Mr. Lamoreux* moved into the house in the month of September, 1910, although work was still being done thereon. The work was nearly finished soon after this. The accounts of the plaintiffs contain items for services in the year 1911 amounting to $62, in 1912 amounting to $11.80, and in 1913 amounting to $9.90. The $11.80 charged in 1912 is claimed to be a charge for a drawing and the $9.90 in 1913 is charged for an inspection of the heating plant which had been in the house since 1910 but had never been settled for nor formally approved, nor had the plaintiffs issued a final certificate of approval therefor. After making this inspection in June, 1913, a certificate was issued for $200 to the heating company on July 25, 1913, leaving a balance due the heating company of $90. The plaintiffs claim a balance due them, under their contract of employment with *Lamoreux,* of $2,427.48. On the 10th day of October, 1913, the plaintiffs filed a claim for lien for this amount, this being within six months of the date of their inspection of the heating plant in June, 1913.

On the 26th day of October, 1910, the defendants *Lamoreux* mortgaged the premises to defendant *Lawrence Fitch* to secure the payment of the sum of $15,000, and the mortgage was duly recorded on the 1st day of November, 1910. About the 9th day of August, 1913, the defendants *Lamoreux* mortgaged the premises to the defendant *Zander,* giving a second mortgage to secure the payment of $10,000, and this mortgage was duly recorded on the 12th day of August, 1913.

The circuit court found that the services for 1908, 1909, and 1910 were continuous and constituted transactions under plaintiffs' contract of employment with *Lamoreux;* that the services rendered subsequent to these times were not rendered under nor a part of the services required by this contract, and held that they were rendered subsequent thereto. The court thereupon awarded judgment allowing the plaintiffs a claim for lien for the $9.90 charge of 1913 and awarded recovery

by a personal judgment for the balance due under the original contract of employment against the defendants *Lamoreux*. The mortgagees were allowed prior liens upon the premises to this lien of the plaintiffs. From such judgment this appeal is taken.

William Kaumheimer, for the appellants, cited *Hutchins v. Bautch,* 123 Wis. 394, 101 N. W. 671; sec. 3314, Stats.; *Vilas v. McDonough Mfg. Co.* 91 Wis. 607, 611, 65 N. W. 488; *Fowler v. Bailley,* 14 Wis. 125; *Chapman v. Wadleigh,* 33 Wis. 267; *Brown v. Edward P. Allis Co.* 98 Wis. 120, 126, 73 N. W. 656; *Taylor v. Dall L. & Z. Co.* 131 Wis. 348, 357, 358, 111 N. W. 490.

For the respondent *Fitch* there was a brief by *Bloodgood, Kemper & Bloodgood,* attorneys, and *Emmet Horan, Jr.,* of counsel, and oral argument by *Mr. Horan.*

SIEBECKER, J. The appellants assail the court's findings of fact, which are to the effect that the plaintiffs' claim for services of 1913 was not for part performance of the original agreement with *Lamoreux* of 1908 and that the services embraced in this claim were rendered after the 1908 contract had been specifically and completely performed. The terms of the original contract were to the effect that the defendant *Lamoreux* employed the plaintiffs as architects to furnish plans and specifications for the construction of a residence for him at the city of Beaver Dam; that they were to superintend its construction, issue certificates for work performed and material furnished in the progress of construction, and to issue final certificates of approval of the work. It appears that the plaintiffs commenced performing these services in 1908 and that the building was practically completed in 1910. *Mr. Lamoreux* took possession of the premises in September, 1910, and continuously resided there until the time when the plaintiffs claim to have rendered their last item of service included in their claim for a lien under their original contract

with *Lamoreux.* This service consisted of an inspection of the heating plant and the issuing of a certificate for a partial payment thereof. It also appears that no final certificate of approval of the heating plant has ever been issued. The controversy between the parties centers about this item of service which the plaintiffs claim was rendered as a final performance of their contract. The omission of plaintiffs to issue their final certificate of approval for the heating apparatus is in accord with the claim that *Mr. Lamoreux's* acts and conduct in respect thereto were an acceptance thereof. The facts and circumstances disclosed that *Lamoreux* used the heating plant in the building after September, 1910, throughout the years 1911, 1912, and up to the month of June, 1913. This operated to modify the terms of plaintiffs' contract requiring their certificate of its approval. It necessarily follows that plaintiffs' services in June, 1913, were not a part performance of their original engagement with *Lamoreux,* but rested upon a separate and independent obligation. The fact that rights of third parties, the mortgagees, have intervened emphasizes these considerations and requires that the want of continuity of the services under the original contract be given its legal effect. It is also apparent from the evidence that the plaintiffs did not continue in the performance of their contract throughout the year 1912. The evidence is too vague and speculative to warrant the conclusion that the plaintiffs were engaged in performing services actually required to carry out their agreement. The trial court evidently concluded that the building was in fact completed in 1911 as contemplated by the contractors, *Lamoreux,* and the plaintiffs. We are of the opinion that this conclusion is justified by the record. In the light of this state of the case the court correctly held, as a matter of law, that continuity of services by plaintiffs under their contract was interrupted, and that the services rendered by plaintiffs in 1912 and 1913 were not within the original contract of plaintiffs' employment, and

properly denied the plaintiffs' claim for a lien as demanded in their complaint. It is obvious that *Lamoreux* accepted the building before June, 1913, and that whatever service plaintiffs performed for him after such acceptance was not within the contract relied on in this action. There is no objection to that part of the judgment allowing plaintiffs a lien for the $9.90 as indicated in the judgment.

By the Court.—The judgment appealed from is affirmed.

McCARTNEY, Executrix, Respondent, vs. BOYD, imp., Appellant.

May 5—June 1, 1915.

Partnership: Fraud of surviving partner: Action for accounting: Sufficiency of complaint: Laches: Misjoinder of causes of action.

1. In an action by a widow, as executrix, against a surviving partner of her deceased husband for an accounting and for cancellation of certain conveyances, a complaint alleging that defendant wilfully concealed partnership property from plaintiff; that he falsely claimed that deceased owed the firm $500; that by means of a false and incomplete list of partnership property he procured an undervaluation thereof by the appraisers; and that by false representations he had induced plaintiff and the guardian of her minor child to join in selling the partnership assets, ostensibly to a third person but in fact to defendant himself, is *held* to state a cause of action based on fraud.
2. Delay in bringing such action for a year after plaintiff was appointed executrix and discovered the fraud was not *per se* laches, especially in the absence of any showing that defendant was injured thereby.
3. A partnership accounting being the main purpose of the action, the prayer for the ancillary remedy of cancellation of the conveyances made by the plaintiff individually did not show a misjoinder of causes of action.

APPEAL from an order of the circuit court for Price county: G. N. RISJORD, Circuit Judge. *Affirmed.*

Action by plaintiff as executrix of the estate of her deceased husband for a cancellation of certain conveyances and for a partnership accounting. The complaint alleges that about the year 1897 her husband and the defendant *Hugh Boyd* entered into a partnership agreement to conduct a summer resort business, each to contribute equally and share equally; that such partnership continued till the death of plaintiff's husband, July 26, 1908, during which time it had acquired valuable real estate and personal property. From July 26, 1908, to March, 1910, the defendant *Boyd* continued to conduct the business. About that time, by reason of his having knowingly and wilfully concealed from her and the guardian of her minor son the existence of valuable partnership property, and falsely claiming that her husband's estate owed the partnership $500, and by fraudulently procuring an undervaluation of the partnership property from the appraisers chosen to appraise it, by presenting to them a false and incomplete list of partnership property, and by falsely representing that it was advisable to make a sale of all partnership assets to one Grieves at a low price, when in fact Grieves was only a dummy and the sale was made to *Boyd* himself, he induced her and the guardian of her minor son to join in conveyances of the partnership property. It is further alleged that she was appointed executrix August 3, 1912, and that upon learning of the deceit practiced upon her she promptly notified the defendant that she would not abide by the conveyances either individually or as executrix. This action was begun October 15, 1913, and prays that the conveyances to Grieves, who had immediately quitclaimed his interest in the property conveyed to him to *Boyd,* and Grieves's conveyance to *Boyd* as well as the settlement made by plaintiff with the defendant *Boyd* be set aside and that *Boyd* be required to account to plaintiff as executrix of the estate of her deceased husband.

The defendant *Boyd* demurred to the complaint and urges

as grounds for demurrer (1) that the complaint does not state facts sufficient to constitute a cause of action, and (2) that two causes of action are improperly joined. From an order overruling the demurrer he appealed.

The cause was submitted for the appellant on the brief of *W. K. Parkinson,* and for the respondent on that of *Fisher, Hanna & Cashin,* attorneys, and *Holland & Lovett,* of counsel.

VINJE, J. The objection to the complaint on the ground that it fails to state facts constituting fraud on the part of the defendant *Boyd* is not tenable. The allegations that he concealed partnership property from the plaintiff and from the guardian of her minor son; that he falsely claimed the estate of her deceased husband owed the partnership $500; that by means of a false and incomplete list of partnership property he procured an undervaluation thereof by the appraisers; and that Grieves was a purchaser when in fact he was not, are allegations of facts showing fraud and are sufficient. *Laun v. Kipp,* 155 Wis. 347, 145 N. W. 183.

It is urged that the complaint shows such laches upon its face that the court ought not to give the desired relief. The action was begun October 15, 1913. On August 3, 1912, plaintiff was appointed executrix. The complaint alleges that upon learning of the fraud of the defendant *Boyd* she promptly notified him that she would not abide by the conveyances either individually or as executrix. From this it follows that she did not discover the fraud until after or about the time she was appointed executrix. A delay of a year in bringing an action of this kind is not *per se* laches, especially in the absence of any facts showing that the defendant had suffered thereby.

Two causes of action were not improperly joined. The complaint seeks an accounting between plaintiff as executrix of her husband's estate and the defendant *Boyd.* That is the

main cause of action. The fact that, in order to have such accounting and to enable the court to award to each what he is justly entitled to, it becomes necessary to cancel agreements made by plaintiff as an individual, is merely giving a remedy ancillary to the main cause of action. Where there is but one primary right sought to be enforced there is only one cause of action though there may be many ancillary remedies asked and awarded. *Simon v. Weaver,* 143 Wis. 330, 127 N. W. 950, and cases cited; *Carthew v. Platteville,* 157 Wis. 322, 147 N. W. 375. The demurrer was properly overruled.

By the Court.—Order affirmed.

SHAFFER, Respondent, vs. PEAVEY, imp., Appellant.

May 5—June 1, 1915.

Bills and notes: Holder in due course: Novation.

A corporation which received certain promissory notes from the payee, before maturity, in the regular course of business, as collateral security for an existing debt of the payee, and in consideration thereof agreed to give further time for the payment of the debt, having no notice of an oral agreement of novation by which the payee had released the maker and accepted another person as liable on the notes, was a holder in due course, and so also was a subsequent purchaser of the notes from the corporation for value and before maturity; and the right of the latter to recover on the notes was not affected by the novation.

APPEAL from a judgment of the circuit court for Bayfield county: G. N. RISJORD, Circuit Judge. *Affirmed.*

Action upon three negotiable promissory notes dated October 23, 1907, given to the Dakota Town Lot Company in part payment for the town site of the village of Carlyle, South Dakota, which was then purchased by the defendants *Peavey* and Ward of said company. These notes, with others of the series amounting in all to $4,300, were secured by mortgage

upon the real estate. As lots in the town site were sold the mortgage was released from the parcel sold. In March, 1908, the defendant and appellant, *Peavey,* sold his interest in the town site to one Kenderdine and deeded the property to Kenderdine and defendant Ward, who continued the business. The deed contained an agreement that Kenderdine assumed and agreed to pay the mortgage indebtedness. There was evidence that the Town Lot Company assented to the arrangement, orally agreed to accept the liability of Kenderdine for the liability of *Peavey,* and released *Peavey* from liability. The Dakota Town Lot Company was very closely related in a business way with the Minnesota, Dakota & Pacific Railway Company, which was building a railroad. The Town Lot Company owned undivided interests with the railway company in certain town sites on the line, and in the course of selling lots received moneys belonging to the railway company. The railway company also advanced from time to time certain sums in payment for right of way through public lands, properly chargeable to the Town Lot Company, and from these transactions there resulted a considerable indebtedness from the Town Lot Company to the railway company, which on January 14, 1908, amounted to more than $11,000. On that day the Town Lot Company indorsed the notes in blank, guaranteed them, and delivered them to the railway company as collateral security for said existing indebtedness and for indebtedness thereafter to be contracted, it being agreed that said existing indebtedness (then represented by a demand note) should be carried along and payment should not be called for until such time as the town-lot business and the right-of-way settlements reached a point where it would be possible for the Town Lot Company to pay. On February 23, 1909, the railway company sold and delivered the notes without further indorsement to the plaintiff, who paid $3,093.10 for notes the principal of which aggregated $3,500, and upon which some interest had accrued. Neither of the

notes had matured at the time of the transfers. The trial court held that the plaintiff was a holder in due course and directed a verdict for the plaintiff for the amount due. Judgment being entered upon the verdict, the defendant *Peavey* appeals.

For the appellant there was a brief by *Lamoreux & Cate,* attorneys, and *Umbreit, Mahon & Jenner,* of counsel, and oral argument by *A. C. Umbreit.*

For the respondent the cause was submitted on the brief of *John Walsh.*

WINSLOW, C. J. The verdict was rightly directed. The only question in the case was whether the plaintiff was a holder in due course. If he was, the agreement of novation does not affect his rights to recover. That he was such holder there can be no doubt. The railway company received the notes in the regular course of business before due as collateral security upon an existing indebtedness and in consideration thereof agreed to give further time to pay such debt. This made the company a *bona fide* holder in due course unless it had notice that there was a defect in the title. *Bowman v. Van Kuren,* 29 Wis. 209. There is no evidence tending to show that the company had actual notice of the novation agreement or of any facts which would be sufficient to constitute constructive notice. It is equally clear that the plaintiff is a holder in due course.

There are no other questions to be considered.

By the Court.—Judgment affirmed.

BOUTIN, Appellant, vs. ANDREAS and another, Respondents.

May 5—June 1, 1915.

Dismissal and nonsuit: Right to dismiss or discontinue: Discretion of court: Counterclaim: Judgment.

1. The trial court may refuse to permit plaintiff to dismiss or discontinue the action, even though such dismissal or discontinuance would not interfere with defendants' right to the trial of the issue on a counterclaim.
2. There is no practical difference between a voluntary dismissal and a discontinuance so far as plaintiff's right to bring another action is concerned.
3. Where there is a real controversy and issue has been duly joined, plaintiff may be compelled to proceed or take a dismissal which will preclude another action for the same cause.
4. Defendants having alleged that it was agreed that performance of a second contract upon which they based their counterclaim should extinguish the plaintiff's claim for damages under the contract sued on, failure to produce evidence in support of such allegation did not preclude defendants from proving their counterclaim and not only recovering the amount due thereon but putting at rest plaintiff's adverse claim.

APPEAL from a judgment of the circuit court for Bayfield county: G. N. RISJORD, Circuit Judge. *Affirmed.*

Action to recover for breach of contract.

Plaintiff claimed defendants breached their warranty respecting a heating plant installed in his residence.

They alleged acceptance of the work and counterclaimed for $163 on a completed contract for furnishing and installing new boilers and connections in place of existing ones, same to be accepted in full satisfaction for any claim he had for damages in respect to the subject mentioned in the complaint. He replied, admitting the contract to install new boilers and material, but denied that performance of such contract was to extinguish his claim for damages. He admitted performance of the secondary contract, but denied that the agreed price therefor amounted to the sum claimed by defendants.

After the case was duly called for trial and before the jury was impaneled plaintiff asked leave to dismiss his complaint, at the same time consenting to permit defendants to enter a judgment of nonsuit. Plaintiff did not offer evidence. Defendants offered evidence to support their claims. The court directed a verdict in their favor for the amount they claimed, and judgment was rendered accordingly.

The cause was submitted for the appellant on the brief of *Hanitch & Hartley,* and for the respondents on that of *E. C. Alvord.*

MARSHALL, J. Did the court err in refusing to permit plaintiff to discontinue?

Appellant's counsel support the affirmative of the question stated upon the theory that a plaintiff, before submission of his case, has an absolute right to dismiss without prejudice to trial of the issue on the counterclaim in case of there being one. The law is otherwise as declared in *State ex rel. Milwaukee v. Ludwig,* 106 Wis. 226, 82 N. W. 158; *Anderson v. Horlick's M. M. Co.* 137 Wis. 569, 119 N. W. 342. Earlier cases, such as *McLeod v. Bertschy,* 33 Wis. 176, to the effect that a plaintiff, as to his own claim has an undoubted right to discontinue, are modified by the later ones holding that the court may, in its discretion, refuse a request therefor, as in this case.

It must be kept in mind that while the term "dismissal" was used in this case, instead of discontinuance, it was a voluntary dismissal which was sought, a mere discontinuance, leaving the plaintiff free to again resort to a judicial remedy for the same redress as before. There is no practical difference between a voluntary dismissal and discontinuance. So, though in *State ex rel. Milwaukee v. Ludwig* and *Anderson v. Horlick's M. M. Co.* the proceeding dealt with was called a discontinuance, it was identical with a voluntary dismissal as regards the after status of the parties.

The trial court had ample reason in this case for refusing to permit appellant, after having brought respondents into court to withdraw his claim and preserve competency to vex them again and take up the time of the court by commencing another action. If parties have a real controversy which must be settled by judicial interference and an issue is once duly made up in respect to the matter, the plaintiff should not be allowed to trifle with judicial administrative facilities by discontinuing without cause. The court may well exercise its authority to compel him to proceed or take a dismissal which will terminate the matter so far as cognizable by courts.

It is said the claim that the secondary contract was in settlement of appellant's claim upon the first contract was not a proper subject for litigation in this action because not pleaded. We perceive no merit in that. Respondents distinctly alleged it was agreed that performance of the secondary contract should extinguish the claim for damages. The failure to produce evidence of such claim by no means precluded them from proving the whole subject of the counterclaim and, not only recovering the amount due thereon, but putting at rest the adverse claim.

Lastly, it is suggested that the court erred in directing a verdict in respondents' favor because the evidence did not establish their claim as to the amount due. The contrary seems plain. One of the defendants testified that the amount of material furnished under the contract was $468.44; that the time to be charged for was 391 hours; that plaintiff was to pay all freight and cartage bills, and that the balance due was $163.94. In the absence of evidence to the contrary there was nothing to do but find for the defendants as was done.

By the Court.—The judgment is affirmed.

MARCUS, Appellant, vs. TOWN OF MEDFORD, Respondent.

May 5—June 1, 1915.

Highways: Duty of town: Injury to pedestrian on side path: Absence of railing at embankment: Sidewalks: Evidence: Harmless error.

1. Towns are not required to keep country roads in suitable condition for travel for their whole width, nor are they required to build sidewalks thereon.
2. A cut having been made through a hill and the traveled track of the highway being through such cut, one who, while walking at night on a footpath which went over the hill within the limits of the highway, was injured by falling down the embankment to the road below, cannot recover from the town for such injury.
3. The traveled track through the cut being reasonably safe, sufficient, and suitable for travelers on foot or by vehicle, and the footpath being obviously outside of the traveled track, the town was not bound to maintain a guard or railing along the top of the embankment to protect persons using such path.
4. The exclusion of evidence as to the action of the town board upon a petition for the laying of a sidewalk along said highway was not prejudicial error, it appearing that the town did not lay the sidewalk and that it did not extend to the place in question.

APPEAL from a judgment of the circuit court for Taylor county: G. N. RISJORD, Circuit Judge. *Affirmed.*

This is an action to recover damages for personal injuries sustained by the plaintiff while traveling on a public highway in the town of *Medford.*

On the evening of August 15, 1911, the plaintiff stepped or fell off from an embankment made by a cut through a hill on one of defendant's highways. The highway runs east and west. On the southerly side of the highway and near the place where plaintiff was injured is a dwelling house occupied by a Mrs. Glassow. This house is situated on the elevation through which the cut has been made. A road fence extends along the northerly line of the Glassow place and the southerly boundary of the highway. The distance from this fence to the edge of the cut varies from ten feet six inches to eleven feet six inches. There was a path in the center of this

space between the road fence and the edge of the cut which was somewhat used by pedestrians. There was on this road a sidewalk extending from the eastern limits of the city of Medford to a point a short distance from the Glassow property. Another sidewalk, beginning at a point some distance east of the Glassow property, extended out to the cemetery. The evidence tends to show that younger people in traveling this highway used the path outside of the traveled track of the road in front of the Glassow residence instead of the road through the cut, but that pedestrians generally used the traveled track until they reached the sidewalk on the east of the Glassow premises. In wet weather travelers at times used this side path in front of the Glassow dwelling because of the muddy condition of the traveled track. It appears that there were no barriers or guards along the bank of the excavation to warn and to prevent persons from falling into the cut.

On the night in question the plaintiff had been at the Glassow home and, hurriedly returning therefrom after dark, she miscalculated the distance from the Glassow road fence to the path and fell over the embankment onto the road below. The plaintiff sustained injuries and was confined to the house for a time.

She alleges in her complaint that the town was negligent in failing to maintain a guard or barrier along this embankment at the cut to make the highway reasonably safe for travel and that it had negligently permitted the traveled portions thereof to be in an insufficient and defective condition and out of repair. It appears that the plaintiff was familiar with the conditions of this path. The traveled track of the highway was in good condition for public travel.

A petition to the town board for a sidewalk was offered in evidence, but the town records disclosed nothing further regarding the action of the board in respect thereto. Plaintiff offered to prove that the petition had been acted upon by the town board and that the sidewalk had been built. There was

no evidence to show that the town undertook to maintain and keep the same in repair. The court did not receive the offered evidence.

Defendant moved for a direction of a verdict on the grounds that the place where the plaintiff sustained her injuries was outside of the traveled portion of the highway, which it is alleged was in a reasonably safe condition for public travel, and that the plaintiff's want of ordinary care proximately caused her injuries. The court granted this motion and directed the jury to return a verdict in favor of the defendant town. Judgment was entered dismissing the action and allowing the defendant its costs and disbursements. From such judgment this appeal is taken.

For the appellant there was a brief by *John B. Hagarty,* attorney, and *John K. Parish,* of counsel, and oral argument by *Mr. Parish.*

For the respondent there was a brief by *W. H. Stafford* and *T. J. Connor,* attorneys, and *Herman Leicht,* of counsel, and oral argument by *Mr. Connor.*

SIEBECKER, J. It is contended that the court erred in rejecting the evidence offered by the plaintiff respecting the action of the town board on the petition for laying a sidewalk on this highway from the limits of the city of Medford to a point near the westerly end of the cut in the road as heretofore described. This ruling was not prejudicial to the plaintiff. It appears that the town did not lay this sidewalk. It also appears that the sidewalk did not extend to the Glassow land, but terminated to the west of the cut and the Glassow place. This renders the evidence as to the action of the board concerning this petition of slight materiality, if any, on the issues raised in the case.

"Towns are not required to keep such roads in suitable condition for travel for their whole width, nor are they required to build sidewalks thereon. . . . The town has performed its

duty if it properly grades and prepares a part of the highway of reasonable width, and keeps the same in a suitable condition for the use of passengers either on foot or in a conveyance." *Hammacher v. New Berlin,* 124 Wis. 249, 102 N. W. 489.

The plaintiff's contention that the part of this road between the Glassow road fence on the southerly margin thereof and the edge of the embankment of the cut, which was used by some pedestrians in traveling this road, constituted a part of the traveled track of this road, is not sustained in the light of the facts of the case. It is shown that the town provided a reasonably safe and properly graded traveled track through the cut and that it was reasonably sufficient and suitable for travelers on foot or by vehicle. It also appears that the actual travel on the road along the path over the embankment, before the Glassow premises, by foot pedestrians was obviously outside of the traveled track and that this was manifest to travelers using this road. Under such conditions and circumstances the town was not required to place a guard or railing on the embankment along the cut in the road to protect persons using the side path. It is clear that plaintiff has no cause of action against the town. The photographs were properly admitted in evidence. The court committed no error in awarding the judgment appealed from.

By the Court.—The judgment appealed from is affirmed.

KELLY, Respondent, vs. KNEELAND-MCLURG LUMBER COMPANY, Appellant.

May 6—June 1, 1915.

Master and servant: Injury while loading logs: Unsafe place: Contributory negligence: Evidence: Excessive damages.

1. In an action for injuries to an employee caused by the rolling of logs which he was assisting in loading upon a car, the evidence, showing that other and safer loading devices might have been

used, is *held* to sustain a finding by the jury that the employer failed to furnish plaintiff a place of employment which was as free from danger as the nature of the employment reasonably permitted.

2. The evidence in such case is *held* also to sustain a finding by the jury that plaintiff was not guilty of contributory negligence.

3. An award of $6,500 for serious and permanent injuries to a man twenty-two years old and earning at the time $55 per month, having been sustained by the trial court, is *held* not so large that this court should disturb it.

APPEAL from a judgment of the circuit court for Price county: G. N. RISJORD, Circuit Judge. *Affirmed.*

Action to recover for personal injury. The complaint is based upon failure to furnish a safe working place. The plaintiff was employed as a common laborer assisting in loading logs on cars, and in the performance of his duties it became necessary for him to be upon a certain car then being loaded for the purpose of adjusting the logs being hoisted in bunches upon said car by means of a mechanical device known as a steam jammer or loader. It is alleged in the complaint that the defendant negligently and carelessly failed to provide plaintiff with either safe employment or a safe place of employment, and failed to promulgate rules for the safety and protection of plaintiff and other employees engaged, and failed to warn plaintiff of the dangers, and failed to furnish proper appliances used in hoisting logs, in consequence of which plaintiff was seriously injured.

The defendant answered admitting its corporate existence and that the plaintiff was injured while in its employ on May 15, 1913, and denied all other allegations of the complaint, and alleged that the plaintiff contributed to said injury by his own negligence, and that the injury was not occasioned by the negligence of the defendant. The jury returned the following verdict:

"(1) Did the defendant fail to furnish plaintiff a place of employment which was as free from danger as the nature of the employment reasonably permitted? *A.* Yes.

"(2) If you answer the first question 'Yes,' then was such failure the proximate cause of plaintiff's injuries? *A.* Yes.

"(3) Was plaintiff guilty of any want of ordinary care which contributed to produce his injuries? *A.* No.

"(4) At what sum do you assess plaintiff's damages? *A.* $6,500."

Judgment was entered in favor of the plaintiff upon the verdict, from which this appeal was taken.

For the appellant there was a brief by *Barry & Barry,* and oral argument by *J. S. Barry.*

W. K. Parkinson, for the respondent.

KERWIN, J. The chief contention of the appellant is that the court erred in denying defendant's motions for nonsuit and directed verdict. It is insisted that no negligence was shown on the part of the defendant and that the evidence showed contributory negligence on the part of plaintiff.

1. The first question presented is whether the evidence was sufficient to support the finding of the jury to the effect that the defendant failed to furnish the plaintiff a place of employment as free from danger as the nature of the employment reasonably permitted. The provisions of the statute applicable are as follows:

Sec. 2394—48, Stats. 1911, requires every employer, among other things, to furnish a place of employment "which shall be safe for employees."

Sub. 1, sec. 2394—49, provides that no employer "shall require, permit or suffer any employee to go or be in any employment or place of employment which is not safe."

Sub. (11), sec. 2394—41, Stats. 1911, provides that "The term 'safe' and 'safety' as applied to an employment or a place of employment shall mean such freedom from danger to the life, health or safety of employees . . . as the nature of the employment will reasonably permit."

Sub. (1), sec. 2394—41, provides: "The phrase 'place of employment' shall mean and include every place, . . . where

either temporarily or permanently any industry, trade or business is carried on. . . ."

This court in several cases has construed the foregoing statutes. *Rosholt v. Worden-Allen Co.* 155 Wis. 168, 144 N. W. 650; *Sparrow v. Menasha P. Co.* 154 Wis. 459, 143 N. W. 317; *Murphy v. Interlake P. & P. Co.* 156 Wis. 9, 145 N. W. 193; *Kendzewski v. Wausau S. F. Co.* 156 Wis. 452, 146 N. W. 516; *Sadowski v. Thomas F. Co.* 157 Wis. 443, 146 N. W. 770.

The plaintiff received the injury complained of while in the employ of the defendant and engaged as toploader in loading logs upon a car. It was his duty under the employment to be upon the car and unhitch or release the chains when the bunch of logs was hoisted onto the car by the loader. At the time of the accident, when the bunch of logs rested upon the load they spread so the bunching chains were taut. The plaintiff, in order to get slack in the chains, rolled up one of the logs in the bunch and got the chains unhooked. Just after getting the chains free the logs started to roll, plaintiff jumped from the load, one of the logs rolled off the car, struck him, and caused the injury. About ten or twelve logs from eight to nine inches in diameter were hoisted onto the car in a bunch and held together by bunching chains.

There is ample evidence that the appliances used by defendant in loading the logs were not as safe as the nature of the employment would permit. The evidence shows that the place could have been rendered safe by the use of "trip bunching chains," which would not have required plaintiff to be in a place of danger, or by the use of a portable platform suspended between the booms, and in other ways. So it is clear from the evidence produced that the jury were well warranted in finding that the place of employment was not as free from danger as the nature of the employment reasonably permitted.

2. It is contended that the finding of the jury that the

plaintiff was not guilty of contributory negligence is not supported by the evidence. Claim is made by appellant that plaintiff should have stood upon the opposite side of the bunch from the side where he stood when injured. There is an abundance of evidence that the place where he stood when he unhitched the chains, just before the injury, was the place usually and ordinarily occupied by toploaders and no more dangerous than the other side of the bunch of logs. Plaintiff had not been instructed to do the work in any other way than he had done it. He had a right to believe, under the evidence, that a position on the opposite side of the bunch would have been as dangerous, or more so, than the position he occupied at the time of the injury.

The appellant also complains of error in refusal to give certain requested instructions on negligence and contributory negligence. There was no error, certainly no prejudicial error, under this head.

3. It is further contended that the damages are excessive. The court below refused to disturb the verdict on the question of damages, and we are not able to say that it was wrong in so holding. True the damages are quite large, but the injury was very serious and permanent. The plaintiff had three operations and suffered much pain. He was twenty-two years of age and earning $55 per month at the time of the injury. At the time he was injured he weighed 180 pounds and at the time of trial below weighed 142 pounds and was unable to work.

We find no reversible error in the record.

By the Court.—The judgment is affirmed.

GILKEY & ANSON COMPANY, Respondent, vs. DOOLITTLE, Appellant.

May 6—June 1, 1915.

Taxation: Action to set aside taxes: Parties: Rights of holder of tax certificate: Illegal taxes: Compromise: Redemption from tax sale.

1. In an action to set aside taxes for which land has been sold the holder of the tax certificate is a proper party, but the county is the real party in interest.
2. In an action directly attacking the validity of a tax certificate, or where a substantial part of the relief sought is the cancellation of a tax certificate, the certificate holder is a necessary party.
3. Although holders of tax certificates have certain rights of which they cannot be deprived without their day in court, they are not particularly favored in the law, a purchaser at a tax sale not being a purchaser in good faith for value.
4. Where, after action brought to set aside as illegal taxes for which land has been sold, a compromise is made with plaintiff by the county officers pursuant to sec. 1210*g*, Stats., payment by plaintiff of the amount thereby agreed upon constitutes a redemption from the tax sale and is binding upon the holder of the tax certificate, although he was not a party to the action and did not participate in the settlement.

APPEAL from a judgment of the circuit court for Oneida county: A. H. REID, Circuit Judge. *Affirmed.*

This was an action of ejectment involving the title to seven descriptions of land in Oneida county. The defendant answered alleging ownership and right of possession under a tax deed recorded more than three years prior to the commencement of the action and setting up the bar of the three-year statute of limitations. The complaint was amended so as to set up a cause of action to quiet title in the grantee of the plaintiff. The facts found material to a consideration of the questions raised on this appeal were as follows: (1) That on May 20, 1908, the plaintiff was the owner of the lands described in the complaint, and that on February 23, 1909, it conveyed the same to one C. P. Crosby by a deed containing

full covenants of warranty; (2) that the lands were subject to taxation in the year 1904 and were taxed by the proper authorities; that such taxes were not paid and the lands were returned delinquent in March, 1905, and were advertised for sale at the annual tax sale held on May 16, 1905, and that the taxes were not paid or redeemed before sale; (3) that the county treasurer commenced the tax sale at 9 o'clock in the morning of May 16th, and each of the parcels of land was sold for the delinquent taxes against the same to L. A. Doolittle before 10 o'clock a. m. of the same day; that the payment of the amounts for which the lands were sold was not made within twenty-four hours of said sale, nor within a week thereafter, but subsequently such payment was made and tax certificates in due form were issued and delivered by the county treasurer to said L. A. Doolittle; (4) that on May 16, 1905, the plaintiff brought an action in equity to set aside the 1904 tax levied on said lands, and in its complaint alleged that the said taxes were illegal on grounds going to the validity of the assessment and affecting the groundwork of the tax, and that in said action it made the county of Oneida and the treasurer and clerk of said county parties defendant; that the original summons and complaint and notice of the pendency of the action were filed at 10 o'clock a. m. of said day, and thereafter and before noon of said day and while the tax sale was proceeding and while said L. A. Doolittle was present in the county treasurer's office the sheriff duly served upon each of said defendants the summons and complaint in said action, and that said Doolittle at said time examined the summons and complaint and was fully advised of the service thereof; (5) that the defendants answered, and thereafter the county clerk, county treasurer, and district attorney of said county, pursuant to sec. 1210*g*, Stats., entered into a written stipulation to compromise with the plaintiff in said action, and by such stipulation admitted the truth of the allegations of the complaint, and agreed to receive in lieu of the whole

taxes levied upon said lands the sum then and there agreed upon, and it was stipulated that upon payment of said sum into court judgment should be entered canceling and annulling said taxes of 1904 upon said lands and tax certificates issued thereon based upon said taxes; that such payment was made by the plaintiff and judgment was accordingly entered by the court on January 11, 1906, and that a duly certified copy of such judgment was forthwith served upon and filed with the county clerk of said county; (6) that through a clerical error the county clerk failed to correctly enter in the tax-sale records in his office the effect of such judgment, in that he failed to note that the tax and tax certificates on the land involved in this action were canceled by said judgment; that as to all other land involved in said action such notation was duly made, and the county treasurer on February 14, 1906, remitted to said Doolittle the amount of all other tax certificates held by him which were canceled by said judgment, together with interest thereon at seven per cent. per annum; that said tax certificates on the lands herein involved were afterwards assigned to the defendant, and on May 21, 1908, a tax deed in due form was duly issued and delivered by the county clerk of Oneida county, purporting to convey the lands herein involved, based upon the tax sale of 1905, which tax deed was duly recorded May 23, 1908; that said lands have ever since been vacant and unoccupied, and that this action was not begun until August 27, 1912.

As conclusions of law the court found (1) that the nonpayment by L. A. Doolittle to the county treasurer of said county for the tax certificates of 1905 issued upon the lands herein involved, which continued for more than twenty-four hours after the tax sale of said year, forfeited his right to demand delivery of said tax certificates, and from the expiration of said twenty-four hours until said certificates were finally paid for and delivered to said Doolittle he had no interest in said certificates; that he was therefore a purchaser of said certifi-

cates subsequent to the commencement of the action to set aside said tax, with full notice both actual and constructive thereof, and that he and his assignees were therefore fully bound by the terms of the judgment rendered in the former action; (2) that the tax deed under which defendant claims title was issued and delivered without authority and contrary to the judgment and decree of the court; (3) that plaintiff was entitled to judgment canceling and annulling the tax deed and for its costs and disbursements. From this judgment defendant appeals.

For the appellant the cause was submitted on the brief of *L. A. Doolittle.*

For the respondent there was a brief by *Curtis, Van Doren & Curtis,* and oral argument by *R. N. Van Doren.*

BARNES, J. The certificate holder might very properly have been made a party to the action brought to set aside the taxes on which the defendant's tax deed is based. *Siegel v. Outagamie Co.* 26 Wis. 70, 72.

Under some circumstances the certificate holder is a necessary party, particularly where the attack is made on the validity of the certificate rather than on the tax on which it was based, or where a substantial part of the relief sought consists in securing a cancellation of the tax certificate. *Watkins v. Milwaukee,* 52 Wis. 98, 102, 8 N. W. 823; *Crites v. Fond du Lac Co.* 67 Wis. 236, 30 N. W. 214; *Pier v. Oneida Co.* 124 Wis. 398, 102 N. W. 912.

The former action was not brought primarily to challenge the tax certificates, but to test the validity of a tax. The result, of course, would affect the certificates, but this was only an incident of the action. The county was the real party in interest therein. *Pier v. Oneida Co., supra.*

While the cases recognize that certificate holders have certain rights of which they cannot be deprived without their day in court, they are not particularly favored in the law.

A buyer at a tax sale is not a purchaser in good faith for value. *Gould v. Sullivan,* 84 Wis. 659, 668, 54 N. W. 1013; *Brown v. Cohn,* 95 Wis. 90, 69 N. W. 71. And the purchaser of a tax certificate *pendente lite* is bound by a judgment setting aside the tax on which the certificate was based, although no notice of *lis pendens* was filed. *Brown v. Cohn, supra; Hixon v. Oneida Co.* 82 Wis. 515, 530, 52 N. W. 445; *T. B. Scott L. Co. v. Oneida Co.* 72 Wis. 158, 160, 39 N. W. 343.

It is elementary that a tax certificate is void where it is shown that the tax on account of which it was issued was paid before sale. A deed issued on such a certificate is likewise void. While the tax certificate in form conveys an equitable interest in the land, that interest may be wiped out by redemption at any time before a deed issues and is recorded. There is no way in which the certificate holder can prevent the landowner from exercising this right. While we do not speak of redemption as payment of the tax, it necessarily includes the element of payment, and it is the matter of paying the tax with interest and charges to the proper officers that constitutes redemption. The receipt customarily issued furnishes the best evidence of the transaction, but is not the only evidence of it.

The law recognizes the fact that illegal assessments may be made, and that where part of a tax is void and part valid the landowner should be compelled to pay the valid part only. The legislature has wisely, we think, provided that controversies involving the validity of taxes might be compromised and settled by enacting sec. 1210*g,* Stats., which reads as follows:

"If it shall appear from any tax roll or tax proceeding that any sum of money is due from any person or is charged against any lands or other property, and such taxes have been returned as delinquent to the county treasurer of the proper county, and such person or the owner of the lands or property so charged with such taxes shall claim such taxes to be illegal

for any cause the county treasurer, county clerk and district attorney of such county may, if they shall deem that there is reasonable cause to believe such taxes illegal, compromise with such person or owner and receive in lieu of the whole tax so appearing due or charged as aforesaid such part thereof as the said county treasurer, county clerk and district attorney, or a majority of them, shall determine to be equitable and for the best interest of such county."

After a tax has been returned delinquent, the county, as held in the *Pier Case* (124 Wis. 398, 102 N. W. 912), is the real party in interest in a suit to set aside taxes. The only effect such a suit ordinarily has on the certificate holder is that he will get a higher rate of interest on his investment if the tax is held valid and the owner is obliged to redeem than he would receive if the tax was held void and the county was obliged to cancel the certificate and refund the cost thereof. In practice this difference has not been considered of sufficient moment to warrant certificate holders in contesting suits brought to set aside the taxes on which their certificates were based and in subjecting themselves to costs in the event of an adverse decision.

The above statute places the power of compromise with the committee provided for. There is no provision that the certificate holder shall have any voice in the settlement, and it was not so intended. The title to tax certificates once properly indorsed can be transferred by a mere delivery of the certificate; so that it is often difficult if not impossible to locate the holders of them. The parties to this suit had a perfect right to get together and agree on how much of the tax was valid and how much was not, and so long as they acted in good faith the certificate holder could not complain of their so doing. The statute gave him no right to be present at or participate in the settlement. That matter is left with the county officers named and the landowner. The parties having, pursuant to statute, agreed on the amount of the tax that was legally chargeable against plaintiff's property, and plaint-

iff having paid such sum, it paid its taxes against its lands for the year in question and paid all of them and paid them as directed. This procedure being authorized by law, we see no escape from the conclusion that the payment to the clerk of the court in this instance constituted a redemption just as much as would payment of the full amount of the tax certificate with interest and charges to the county clerk. The taxpayer has done all that the law requires of him and in the manner required. Up to this point everything that was done might properly be done without the presence, knowledge, or consent of the certificate holder. When the amount that should lawfully be paid was lawfully fixed and was paid in the manner provided by law, it seems very clear that this was a redemption of the land involved from the tax sale. The power of settlement conferred on the county officers mentioned does not cease when the land involved is sold for the tax in dispute.

It may be conceded that so much of the judgment in the former action as in form canceled and annulled the defendant's tax certificate is not binding or conclusive on him. It is unnecessary for the plaintiff to rely on it. It may, however, rely on the fact of payment and redemption. If there had been no former action, plaintiff could succeed in the present one by showing, for instance, that it had paid the tax before sale, or that it had redeemed the land after sale in the usual way. It might do this without the production of either a tax or redemption receipt and in the absence of any record showing payment, provided it was able to show by other satisfactory evidence that it paid the right amount of money to the proper officer. *Gould v. Sullivan,* 84 Wis. 659, 54 N. W. 1013. We are presently dealing with a statute designed to meet cases where part of the tax is illegal. There the payment is made in a way different from the ordinary method. The landowner may pay the lawful part of the tax assessed against his property and be relieved from the unlawful part.

When payment is made in this class of cases in the manner provided by law, the conclusion seems inevitable that the land is redeemed from the tax sale and the certificate holder can get no title by virtue of his certificate. He is entitled to a return of the money which he paid the county, with interest. Sec. 1184, Stats. This is the measure of his relief.

We do not wish to be understood as holding that the decision of the circuit court was not placed on tenable grounds. We prefer, however, to rest our judgment of affirmance on the ground herein stated.

By the Court.—Judgment affirmed.

STATE EX REL. DORWIN, Respondent, vs. WHITE, Appellant.

May 6—June 1, 1915.

Official bonds: Omissions: Effect: Amount of penalty: School district officers: Treasurer: Vacancy.

1. Where the intent is clear and undisputed, a mere omission to insert words intended and authorized to be inserted cannot be held to defeat an official bond which all parties have treated as valid.
2. In the bond of a school district treasurer, duly executed by him and by his sureties and duly filed and approved, the amount of the penalty was not inserted, the proper amount not yet having been determined; but said treasurer and sureties intended to give and believed they gave the statutory bond, and they expected and authorized the director and clerk of the district to ascertain the proper amount as required by law and to insert the same in the blank space left therefor in the bond. *Held*, that the failure of the director and clerk so to do did not defeat the bond or prevent the treasurer from duly qualifying.

APPEAL from a judgment of the circuit court for Oneida county: A. H. REID, Circuit Judge. *Affirmed.*

Action to oust defendant from the office of treasurer of

school district No. 1 of the town of Minocqua. The court found as facts:

"(1) That the relator was, on the 5th day of July, 1912, duly elected treasurer of school district number one of the town of Minocqua, Oneida county, Wisconsin.

"(2) That the relator was, at the time of his said election and ever since has been, a duly qualified elector of said town of Minocqua.

"(3) That within ten days after his said election the relator duly executed to said district and filed with the clerk thereof a bond with sufficient sureties, conditioned as provided by law, which bond was presented to and duly approved by the director and clerk of said district by written indorsement upon said bond, signed by said director and clerk, and was placed with the records and files of the clerk.

"(4) That said bond, when signed by relator and by the sureties thereof, contained no sum in the blank space therein provided for the amount of the penalty, nor were the names of the sureties or the date of the execution of said bond inserted; that blank spaces were provided in said bond for the names of the sureties, the amount of the penalty, and for such date, and that relator and said sureties knew when they signed the same that said blanks were not filled.

"(5) That at the time said bond was executed and at the time the same was filed with the clerk and approved by the director and clerk of said district, the amount of money to come into the hands of the treasurer thereof was unascertained and unascertainable; that the electors of the town of Minocqua at the last preceding town meeting had voted an appropriation for the maintenance of the schools in said town, which included the maintenance of the high school and the schools in said school district number one, and at the times aforesaid no division of such appropriation had been made between the said high school district and said school district number one. That said sureties at the time they signed said bond knew the aforesaid facts and expressly authorized the relator to fill in said blanks and to insert the amount of the penalty whenever he ascertained and determined what the amount of such penalty should properly be. That said sureties signed said bond with intent thereby to become sureties

on the official bond of relator as such treasurer and knowing that relator intended to present and file the same with the director and clerk of said district as his official bond.

"(6) That when said bond was so filed with the clerk and approved by the director and clerk, said director and clerk were advised by relator of the omission of the amount of the penalty thereof and that they were authorized to insert such amounts therein as they deemed necessary in compliance with the statute applicable thereto; that said director and clerk then decided to postpone the insertion of the amount of the penalty in said bond until such time as they should ascertain and determine the amount of moneys to come into the relator's hands as such treasurer.

"(7) That said director and clerk failed to insert the amount of such penalty in said bond and the same has not been inserted; that neither of the sureties on said bond have requested to be relieved therefrom and both are still alive and responsible.

"(8) That the director and clerk of said district have not at any time demanded or requested that relator furnish any additional bond as such treasurer.

"(9) That relator was appointed treasurer of said high school district in July, 1912, and duly furnished bond in the sum of seven thousand dollars ($7,000) to said high school district on July 20, 1912, and said relator thereafter continued in office and has ever since been treasurer of said high school district.

"(10) That the director and clerk of said district number one (1), on or about December 1, 1913, declared the office of treasurer vacant, attempted to and in form did appoint the defendant as treasurer of said district, and claimed that relator had vacated his office as such treasurer because of the alleged failure to furnish a bond within ten days after his said election. That the town clerk of said town at the same time attempted to and in form did make the same appointment. That demand thereafter was made upon the relator for the surrender to the defendant of the books and papers appertaining thereto; that relator delivered some of such books and papers to the defendant, but did not deliver to him the record book of said office; that relator claimed to be treasurer of said district at the same time of the delivery of said

papers to the defendant, but did not contest his right to such office by refusal to make such delivery.

"(11) That this action was commenced on the 9th day of February, 1914.

"(12) That the relator duly performed all the duties of his said office and no proceedings were at any time taken to remove him therefrom other than at the attempted declaration of a vacancy and the appointment of the defendant as aforesaid."

As conclusions of law the court found:

"(1) Relator was duly elected treasurer of school district number one of the town of Minocqua, Oneida county, Wisconsin, on July 5, 1912.

"(2) That within ten days after his said election relator duly filed with the clerk of said school district his bond as such treasurer, which said bond was duly approved by the director and clerk of said district.

"(3) That it was the duty of the director and clerk of said district to determine the amount of the penalty of said bond.

"(4) That the director and clerk were expressly authorized by relator and the sureties in said bond, and it was their duty, to complete the said bond by filling in the amount of the penalty, the date, and the names of the sureties.

"(5) That the execution of said bond by relator and said sureties without the blanks therein being properly filled gave to said director and clerk implied authority, and it was their duty, to complete said bond by filling in the amount of the penalty, the date, and names of the sureties.

"(6) That the omission of the amount of the penalty, the date, and names of the sureties in said bond was due to the failure of the director and clerk to perform their duty by exercise of their authority to fill in the amount of said penalty, date, and names of sureties.

"(7) The failure of the director and clerk to perform their said duty did not prevent the relator from duly qualifying as such treasurer, he having done all that he could to comply with the law relating to such qualification.

"(8) The relator did not and has not abandoned the office of treasurer of said district.

"(9) No vacancy in the office of treasurer existed at the

time of the attempted appointment of the defendant as such treasurer.

"(10) That the relator was at the time of the commencement of this action, and ever since the 14th day of July, 1912, has been and still is, the duly elected and qualified treasurer of said district and entitled to all the books, records, papers, money, and emoluments thereof.

"(11) That the defendant on or about the 1st day of December, 1913, without right or legal authority, intruded into and usurped said office and still unlawfully holds and exercises the same, and has no right to said office and should be ousted and excluded therefrom.

"(12) That relator is entitled to recover of the defendant the costs and disbursements of this action."

From a judgment entered accordingly the defendant appealed.

John Van Hecke, for the appellant.

For the respondent there was a brief by *Curtis, Van Doren & Cole,* and oral argument by *R. N. Van Doren.*

VINJE, J. The learned trial court held the bond valid, though the amount of the penalty was not inserted therein, on the ground that, since sec. 443, Stats. 1913, requires the approval of the bond by the director and clerk, it places upon them the duty to ascertain the amount of the bond; that they should have done so; that when the amount was ascertained they should, pursuant to the authority given them by the relator and sureties, have inserted it in the bond in the blank space left for that purpose, and that their failure to do so could not prevent relator from legally qualifying. The court reached the correct conclusion upon the facts found. Both the relator and the sureties intended to give, and believed they gave, the statutory bond. They intended and expected that the proper officers would ascertain the amount of the bond as the statute requires in double the amount of funds likely to come into the hands of the treasurer during his term of office, and that the amount when so ascertained would be

inserted therein. The sureties and the relator did all they could to file a legal bond, and had the clerk and director done their duty as contemplated by the statute and those who signed the bond it would in form as well as in fact have been a complete bond. Substance and not the form must control. Where the intent is clear and undisputed, a mere omission to insert words intended and authorized to be inserted cannot be held to defeat a bond which all parties have treated as valid. Likewise it has been held that a word not intended to be in a bond and which was inserted by clerical error should be read out of it in order to effectuate the real intent of the parties. *Marlatt v. Chipman,* 160 Wis. 193, 151 N. W. 249. That one may be bound by an instrument authorized by him to be filled out by another is well settled in this state. *Friend v. Yahr,* 126 Wis. 291, 104 N. W. 997.

The finding that the relator did not abandon the office has such support in the evidence that it cannot be set aside.

By the Court.—Judgment affirmed.

LINDQUIST, Respondent, vs. TOWN OF BRADLEY, Appellant, and another, Respondent.

May 6—June 1, 1915.

Highways: Injury from defect: Instructions to jury: When accumulation of snow has "existed for three weeks:" Object left in highway by individual: Liability: Appeal: Printed case: Evidence.

1. In an action for injuries alleged to have been caused by defects in a highway, a charge that the law requires towns to keep their highways in a reasonably safe condition, and that the jury were to apply their experience and judgment to the existing circumstances in each case and say whether the highway was reasonably safe, was not erroneous either as informing the jury of the effect of their answers or as allowing them to base an answer on their own knowledge and not upon the evidence.

2. An accumulation of snow or ice upon a highway "existed for three weeks" within the meaning of sec. 1339, Stats., if it and the danger resulting therefrom existed for that time in substantially the same form and degree, though subject to those natural changes inevitable in our climate.
3. A boom-stick left upon the highway by an individual defendant, and upon which plaintiff's head struck when she was thrown from a sleigh, having had nothing to do with the unsafe condition of the highway and no proximate relation to the accident, a nonsuit as to such defendant was proper.
4. The supreme court may refuse to consider appellant's contentions based upon the evidence where, in violation of Rule 6, the printed case contains neither the evidence nor an abridgment thereof.

APPEAL from a judgment of the circuit court for Lincoln county: A. H. REID, Circuit Judge. *Affirmed.*

Highway injury. On the 9th of March, 1913, at about 9 o'clock in the evening, the plaintiff was riding in a two-horse sleigh on a north and south highway in the defendant town and was thrown out and injured. The testimony tended to prove that the sleigh tipped over by reason of the fact that there was a deep drift of snow extending from the west line of the highway and covering a large part of the traveled portion thereof, which made it necessary for teams to travel on the extreme east edge of the turnpike, thus throwing the east runner of the sleigh into a hole or depression on that side of the turnpike. There was evidence that this condition had existed for more than three weeks before the accident. There was also evidence that about two weeks before the accident some men working for the defendant *Gillette,* who were hauling boom-sticks, left a large boom-stick some thirty feet in length on the east side of the highway several feet east of the spot where the accident happened, and that the plaintiff's head struck the boom-stick when the sleigh was overturned. There was no evidence that the boom-stick had anything to do with causing the accident. *Gillette* was made a defendant because of the presence of the boom-stick at the place of the accident.

A verdict was directed in favor of the defendant *Gillette* and the following special verdict rendered on the issues between the plaintiff and the town of *Bradley,* viz.:

"(1) Was that part of the highway where plaintiff was injured reasonably safe for public travel at the time of her injury? *A.* No.

"(2) If you answer the first question 'No,' then answer this: Did the same lack of reasonable safety exist for three weeks continuously immediately before plaintiff's injury? *A.* Yes.

"(3) If you answer the first question 'No,' then answer this: Did the chairman of the defendant town know of said lack of reasonable safety at such time that by reasonable diligence he could have made said highway reasonably safe before plaintiff was injured? *A.* Yes.

"(4) If you answer the first question 'No,' then answer this: Did said lack of reasonable safety exist for such length of time that the officers of the defendant town, if they had exercised reasonable diligence, would have known of the same in time to have made said highway reasonably safe before plaintiff was injured? *A.* Yes.

"(5) If you answer the first question 'No,' then answer this: Was the same lack of reasonable safety of the highway the proximate cause of plaintiff's said injury? *A.* Yes.

"(6) Did George Henderson fail to use ordinary care in driving the team at the time of the accident and thereby proximately contribute to produce said injury? *A.* No.

"(7) What sum of money would fairly compensate the plaintiff for the said injuries which she received? *A.* $1,200."

Judgment being rendered on the verdict, the town of *Bradley* appeals.

For the appellant the cause was submitted on the brief of *G. M. Sheldon.*

For the respondent *Lindquist* there was a brief by *J. R. Pfiffner,* attorney, and *John Van Hecke,* of counsel, and oral argument by *Mr. Pfiffner.*

For the respondent *Gillette* the cause was submitted on the brief of *F. J. & A. H. Smith.*

WINSLOW, C. J. There is really little call for an opinion in this case. The questions of the special verdict fully and fairly covered the issues in the case, the answers were based on sufficient evidence and amply supported the judgment. The charge was fair and essentially correct. Complaint is made because the trial judge, after telling the jury that the law requires towns to keep their highways in a reasonably safe condition for travel by night or day, said that the law did not undertake to define what constitutes a safe highway, but the jury were to apply their experience and judgment to the existing circumstances in each case and say whether the highway was reasonably safe. It is said that this instruction informed the jury of the effect of their answers and allowed the jury to base an answer on their own knowledge and not upon the evidence in the case. Neither objection is substantial. It was entirely proper for the jury to know that towns are required to keep their highways in a reasonably safe condition. Most intelligent jurymen know that fact before they go into the jury box, and they certainly know it after listening to the trial of a highway injury case. It was also proper to say that the jury were to decide whether the highway was reasonably safe or not by applying their own judgment and experience to the existing circumstances. It would have been a little more accurate to have said "the existing circumstances as shown by the evidence," but we have no doubt that the jury so understood the instruction.

Complaint is also made because the court charged the jury in connection with the second question that if the same unsafe condition and danger existed continuously for three weeks in substantially the same form and to the same extent and degree, then the lack of reasonable safety may be deemed continuous even though storms and drifting may have changed in some respects the physical condition or even caused the traveled track to be gradually shifted. We find no error in this. It would rarely be possible to point to an instance

where an accumulation of snow or ice existed for three weeks in exactly the same condition in any winter. There will always be slight variations during such a period, and when the legislature provided that a recovery might be had for damages sustained by reason of an accumulation of snow or ice, provided the same had existed for three weeks, they must have meant that it had existed in substantially the same form and degree though subject to those natural changes inevitable in our climate which have not materially affected its dangerous character.

The boom-stick had nothing to do with the unsafe condition of the highway, had no proximate relation to the accident, and hence there was no error in directing a verdict for the defendant *Gillette*.

There are no other errors alleged which we deem worthy of specific treatment. The appellant printed neither the evidence nor an abridgment thereof in the case, although it makes several contentions based upon the evidence, notably the contention that a verdict should have been directed for the defendant. This is a clear violation of Rule 6 of the rules of this court. We might on that account have refused to consider any of the questions referred to. We have, however, examined the record to satisfy ourselves that injustice has not been done.

By the Court.—Judgment affirmed, with costs in favor of the respondent *Lindquist* against the appellant town; the respondent *Gillette* to recover only the cost of printing brief against the appellant.

BERNTZON, Respondent, vs. EDWARDSEN and another, Appellants.

May 6—June 1, 1915.

Vendor and purchaser of land: Waste: Injunction: Chattel mortgages: Sale: Failure to file affidavit: Discharge.

A preliminary injunctional order restraining, at the suit of the vendor, the vendees in a land contract from committing waste by cutting timber on the land, is affirmed. BARNES, J., dissents, on the ground that the vendees' indebtedness for the purchase price had been discharged by the vendor's failure to file the affidavit required by sec. 2316c, Stats., after a sale of property under a chattel mortgage which the vendor had taken as additional security for the payment of said price.

APPEAL from an order of the circuit court for Marathon county: A. H. REID, Circuit Judge. *Affirmed.*

Action to restrain commission of waste.

The complaint was to this effect: April 12, 1913, plaintiff contracted in writing to sell a particular farm and some live stock thereon for $4,500, of which $500 was paid down, the balance was agreed to be paid in specified instalments, and a promissory note conditioned accordingly was given. It was stipulated in the land contract that the vendee should not cut or remove any timber from the land in advance of at least $1,500 of the purchase price of the property being paid. In addition to retention of title to the land as security for the deferred payments, plaintiff took a chattel mortgage on the live stock and duly filed the same. Prior to May 8, 1914, plaintiff received payments on the note to the extent of $423.21. On that day under the terms of the chattel mortgage and without consent of defendants he caused the mortgaged chattels to be seized and sold. The net proceeds thereof were $434.54. He failed to comply with sec. 2316*c*, Stats. 1913. December 1, 1914, defendants, without having paid $1,500 on the purchase price of the farm and live stock began cutting timber from the land with the intention of removing the same and refused to desist therefrom, though plaintiff de-

manded that they do so. They are irresponsible and if permitted to breach the contract by committing waste upon the land plaintiff will be irremediably damaged.

Appropriate permanent relief was demanded and an interim injunction asked for.

Defendants answered admitting the claim as to their cutting timber with the intention to remove the same from the land and without having paid in money the $1,500, as provided in the land contract, and insisted upon their having a right to do so because their purpose was to clear the land for cultivation and because the indebtedness covered by the chattel mortgage and land contract was extinguished by failure of plaintiff to comply with the statute as to enforcing chattel mortgages.

On the pleadings and properly exhibiting the same as aforesaid the court granted the plaintiff the protection of a preliminary injunction restraining defendants pending the action from cutting and removing timber from the land. They appealed.

The cause was submitted for the appellants on the brief of *Brown, Pradt & Genrich,* and for the respondent on that of *Kreutzer, Bird, Rosenberry & Okoneski.*

PER CURIAM. In this case, though the idea prevails that the order should be affirmed, there is such conflict of views as to the ground therefor, it is considered the general practice in such situation of pronouncing judgment of affirmance without any opinion being filed should be followed and such is the order.

BARNES, J. (*dissenting*). The real estate and chattel mortgages were given to secure the same indebtedness. Sec. 2316*c*, Stats., provides:

"In case of the failure of the owner of any such mortgage, or his agent conducting such sale, to comply with the provisions of this section within the time herein limited, the debt

secured by such mortgage shall be deemed fully satisfied and the mortgage canceled."

This is a pretty plain statute. Like many other statutes on our books, the penalty provided for violation is grossly excessive. By the terms of the statute the chattel mortgage is not only canceled, but the debt which it secured is *"deemed fully satisfied."* If the statute means what it says, the defendants owed the plaintiff nothing when the action was begun, and he was entitled to no relief.

I think the way to deal with statutes of this kind is to enforce them as they are written. I believe the legislature in this instance meant just what it said. There is a tendency to insure obedience to many statutes by imposing excessive penalties. The fact is lost sight of that not every one is familiar with our statute law, although presumed to know it, and that there are innocent violations of the statutes, in the sense that the violators do not know they are doing wrong when they do the forbidden act or fail to do the act required.

If this were a case where the plaintiff held a note and mortgage on a cow for $40, and the property had been seized and sold and brought only $30 at the sale, the court, I think, would have no hesitancy in finding not only that the mortgage was canceled, but that the debt secured by the mortgage was satisfied. This is evidently the kind of a situation the legislature had in mind when the law was passed. It was not thinking in large sums or about exceptional cases. It deemed it just to require that the affidavit provided for be filed, and, in order to secure obedience to its mandate, said that failure to file should operate as a satisfaction of the debt secured by the mortgage. It rather shocks our sense of right and justice to say that the plaintiff should lose $4,000 here because he failed to comply with the statute by filing the affidavit required thereby. Still, I think this does not change the law, and if the debt of $10 is satisfied in the supposed case referred to, it is not easy to see why the entire debt is not satisfied here.

SHEQUIN, Appellant, vs. SHEQUIN, Respondent.

May 5—June 1, 1915.

Divorce: Absolute or limited? Prayer of complaint: Consent of counsel: Division of property: Motion to modify decision: Discretion.

1. Under sec. 2358, Stats., a divorce from the bonds of matrimony may be granted upon proof warranting such judgment, even though the complaint asked only a limited divorce.
2. In an action for a limited divorce, the consent of plaintiff's attorneys to a judgment of absolute divorce is binding upon plaintiff, and the prayer of the complaint may be treated as amended accordingly.
3. Upon granting to the wife a divorce on the ground of cruelty, the court has power to divide property held in the wife's name but derived from the husband; and where the value of the property of the parties was $8,050, all of which had been purchased by the husband's earnings except that the wife had contributed thereto her separate estate of $350, a division giving to the wife $2,600 and the $350 so contributed by her was not erroneous.
4. A motion for modification of the decision in a divorce action and for permission to produce further evidence, made after the filing of the decision but before judgment, was addressed to the discretion of the trial court; and no abuse of such discretion appearing, the denial of the motion is sustained.

APPEAL from a judgment of the circuit court for Brown county: HENRY GRAASS, Circuit Judge. *Affirmed.*

This action was brought by the plaintiff against the defendant for divorce from the bonds of matrimony, but before trial the prayer of the complaint was amended so as to demand a divorce from bed and board.

The answer denied the material allegations of the complaint respecting cruel and inhuman treatment and by counterclaim set up cruel and inhuman treatment on the part of the plaintiff, and also asked that the title to certain real estate which had been conveyed to the plaintiff be divested and the title vested in the defendant. The prayer of the original answer of the defendant was for a divorce from bed and board, and after the plaintiff's complaint was amended so as

to pray for a divorce from bed and board the defendant obtained an amendment to the prayer of his answer asking for an absolute divorce.

The court rendered its decision dissolving the bonds of matrimony and making a final division of property, which it found to be worth $8,050 and allowed plaintiff $2,950 and vested the title to the real estate, which was in the plaintiff's name, in the defendant.

The court below made the following findings and conclusions:

That the parties intermarried May 8, 1894, and have ever since resided in the state of Wisconsin; that at the time of their marriage defendant was worth $3,000, and that the plaintiff during the latter part of her married life received from her mother's estate $350; that at the time of said action there was in the joint names of plaintiff and defendant real estate and personal property of the value of $8,050; that said property consists of lots 1 and 2, Kelley's addition to the city of Green Bay, and real-estate mortgage known as the Umentum mortgage, being in the form of a land contract on the west half of the east half of the northeast quarter, section 22, township 23, range 21 east; that all of said property was purchased with the earnings of the defendant with the exception of the $350 interest owned by plaintiff, and that the net worth of the joint properties was $7,700; that the defendant was guilty of a course of cruel and inhuman treatment of plaintiff as set forth in the court's decision herein on file; that defendant is an able-bodied man, capable of earning an average wage of $95 per month; that the children of the parties are two, to wit, George Shequin, aged eighteen years, and Eileen Shequin, aged fourteen years; that the mother, this plaintiff, is a fit and proper person to have the care and custody of them.

The court concluded that the plaintiff is entitled to a divorce from the bonds of matrimony, plaintiff's attorneys,

Martin, Martin & Martin, having in open court acquiesced in said conclusion; that she is entitled to an allowance for the support and education of said Eileen Shequin of $150 per year, $50 payable every four months until she finishes her education in high school; should she leave school to seek a position or employment before graduation, this decree may then be modified respecting such payments; that no sum should be paid for the support of George Shequin, he having finished his high school education and being large, strong, healthy, and able to work; that in lieu of alimony a final division and disposition of the estate, real and personal, of said defendant, and so much thereof as may be held by him or by this plaintiff, be and is hereby made between the parties, plaintiff having failed to exercise her option as provided by the decision of this court heretofore filed, as follows: that the real estate described as lots 1 and 2, Kelley's addition to the city of Green Bay, Brown county, Wisconsin, be and the same is hereby awarded to the defendant, *George Shequin,* and the title in fee thereof is hereby divested from the plaintiff and transferred to the defendant absolutely; that the defendant pay to the plaintiff, in lieu of her interest in said property and as such final division thereof, $2,950, which includes her separate property of $350; that the plaintiff have the household furniture, cooking utensils, and household furnishings belonging to the defendant and to the plaintiff separately or jointly, and that title therein be vested in this plaintiff; that the title to the above described property, to wit, the west half of the east half of the northeast quarter, section twenty-two (22), township twenty-three (23), range twenty-one (21) east, is awarded to the defendant, and the title in fee thereof is hereby divested from the plaintiff and transferred to the defendant absolutely, subject, however, to the land contract thereon held by the said John Umentum; that the plaintiff recover her taxable costs in this action; that the plaintiff be awarded the care and custody of the minor children, George

Shequin and Eileen Shequin, with permission to defendant to visit them at all proper and reasonable hours.

Judgment was entered upon these findings, from which the plaintiff appeals.

J. H. M. Wigman, for the appellant.

For the respondent there was a brief by *Sheridan, Evans & Merrill,* attorneys, and *Victor I. Minahan,* of counsel, and oral argument by *Mr. Minahan.*

KERWIN, J. 1. It is contended that the court erred in dissolving the bonds of matrimony at the request of the guilty party and against the protest of the plaintiff. The record shows that the judgment was entered by consent of the attorneys for the plaintiff.

The evidence is ample to support the finding that the defendant was guilty of cruel and inhuman treatment and the findings fully support the judgment. The mere fact that the prayer of the complaint asked for a limited divorce did not preclude the court from granting a divorce from the bonds of matrimony when the proof warranted such judgment. Sec. 2358, Stats.; *Dutcher v. Dutcher,* 39 Wis. 651.

Moreover, the consent of the plaintiff's attorneys to the rendition of the judgment is binding upon plaintiff and the prayer of the complaint may be treated amended accordingly. *Beem v. Kimberly,* 72 Wis. 343, 39 N. W. 542; *Lowe v. Ring,* 115 Wis. 575, 92 N. W. 238; *Ill. S. Co. v. Warras,* 141 Wis. 119, 123 N. W. 656; 4 Cyc. 935.

2. It is further argued by counsel for appellant that the court erred in the division of property. The findings set out in the statement of facts are supported by the evidence. The title to the real estate divided was in the plaintiff, having been placed there by defendant when in poor health. But the court had power under the statute to divide the property, the title to which was in the plaintiff. Sec. 2364, Stats. This statute provides in part that "the court may finally di-

vide and distribute the estate, both real and personal, of the husband and so much of the estate of the wife as shall have been derived from the husband. . . ."

But it is insisted that in view of the fault of the defendant and the circumstances of the case the plaintiff should have been awarded a larger portion of the estate. The value of the property at the time of trial was $8,050, which included $350 of plaintiff's separate estate. The plaintiff was awarded $2,600 and $350, amount of her separate estate. We cannot say that the court erred in this division. *Edleman v. Edleman,* 125 Wis. 270, 104 N. W. 56; *Roelke v. Roelke,* 103 Wis. 204, 78 N. W. 923; *Lindenmann v. Lindenmann,* 118 Wis. 175, 95 N. W. 96; *Von Trott v. Von Trott,* 118 Wis. 29, 94 N. W. 798.

3. After decision of the case and before judgment the plaintiff moved for a modification of the decision and to be permitted to produce further evidence. The appellant claims that the court erred in denying this motion. The motion was addressed to the discretion of the court. *Robinson v. Oconto,* 154 Wis. 64, 142 N. W. 125.

The court below rendered a decision in writing upon this motion, which appears in the record, and from which it appears that the court very carefully considered the matter and held that the motion should not be granted. We are clear from an examination of the record that there was no abuse of discretion in denying the motion.

By the Court.—The judgment is affirmed.

STATE EX REL. OWEN, Attorney General, vs. DONALD, Secretary of State.

May 8—June 8, 1915.

Taxation: Mineral rights: Constitutional law: Equal protection of the laws: Classification.

Sec. 1042*j*, Stats. (ch. 367, Laws 1913), relating to the taxation of mineral rights and providing, among other things, that they shall be sold for nonpayment of taxes only to the owner of the fee or to the state, is unconstitutional in that it violates the guaranties of equal protection of the laws contained in the state and federal constitutions. The classification of real property thereby attempted cannot be justified. WINSLOW, C. J., and SIEBECKER and KERWIN, JJ., dissent.

MANDAMUS action commenced in this court to compel the secretary of state to audit orders of the commissioners of public lands for payment to Ashland county of $253.04 for tax claims on mineral rights acquired, in form, by the state under ch. 367, Laws 1913.

The petition stated all the facts necessary to a cause of action for the relief prayed for, if the act of 1913 aforesaid be constitutional. Issue was duly joined in respect thereto and the cause submitted for decision on the 8th day of May, 1915.

The legislative enactment claimed by defendant to be unconstitutional is embodied in sec. 1042*j* and sub. 1, sec. 172—37, Stats., as follows:

"Section 1042*j*. 1. Any and all rights and reservations to enter upon and take away any mineral from any lands within the state of Wisconsin, granted by or reserved in any deed or conveyance of such lands, the title to which right or reservation is vested or may hereafter become vested in any person or corporation other than the owner of the fee to which such right or reservation is attached, is hereby declared to be taxable; and the same shall be separately assessed for taxation, and like proceedings shall be had thereon relating to the levy, collection, and sale thereof for the nonpayment of taxes against said reservation, as are in force from time to time for

the levy and collection of taxes on real estate and the sale of the same for the nonpayment thereof. Provided, that such reservations and rights reserved prior to the passage and publication of this act shall be sold for nonpayment of taxes only to the owner of the fee to which such right or reservation is attached, or to the state as hereinafter provided; and provided further, that such reservations and rights reserved after the passage and publication of this act and sold for taxes shall be sold only to such owner or to the state. Whenever any such reservations or rights are sold to the state for unpaid taxes, the owner of the fee shall have the right at any time within three years to purchase from the state the tax certificates held by it upon such reservations or rights by paying the total amount paid by the state plus ten per cent. interest per annum on such amount. The county treasurer of each county shall furnish the commissioners of public lands a list of all such rights to be sold to the state, together with a description of each parcel and the taxes and charges thereon, and the amount of such taxes and charges shall be paid to the county treasurer of such county from any moneys appropriated from the general fund of the state to carry out the provisions of this section on the order of the commissioners of public lands after being audited by the secretary of state.

"2. No such right to reservation so acquired by the state shall be completely alienated or sold but may be leased for limited periods of time on a royalty basis; but such lease shall provide for a just and reasonable remuneration to said owner of the fee for any damage to the surface, resulting from the exercise of the right so acquired by the state to enter upon and take away any mineral from the land; and all such payments shall be made from the appropriation made for carrying out the provisions of this section.

"3. The assessing officer of the several assessment districts may require the owner of any such title to or reservation of the right to enter upon and take away mineral from any lands in the state to make return under oath to him of the value of such right, and in case the owner of such right shall refuse or neglect to make such return to the assessor of the district where said lands are situated the assessor of such district may assess and value the rights reserved at what in his opinion and judgment shall be its fair market value, and in such

case the owner of such reserved right shall not be heard to complain because of the value placed thereon by the assessing officer; however, in case such reserved interest is valued by the owner, the assessing officer shall not be bound by the value fixed thereon by such owner, but may, notwithstanding, assess such interest at such sum as shall, in his best judgment, be the true value of the same.

"4. Nothing in this act, however, shall extend to mining leases, made as such in good faith, which are terminable upon failure to fulfil the terms and conditions of such leases."

"Section 172—37. 1. There is annually appropriated on July first, such sums as may be necessary payable from any moneys in the general fund, not otherwise appropriated, for the commissioners of the public lands to carry into effect the provisions of section 1042*j*."

The *Attorney General,* for the plaintiff.

F. R. Bentley, special counsel, for the defendant.

MARSHALL, J. Does the quoted legislative enactment violate the guaranties of equal protection of the laws contained in the state and federal constitutions, by putting the particular species of real estate in a class by itself and treating the same for public revenue purposes and the owners thereof materially different than other forms of real estate and the owners thereof are treated?

Though the constitutionality of the act in question was challenged by defendant upon several grounds, only those covered by the stated question were considered in deciding the case. It is the opinion of the court, the Chief Justice and Justices SIEBECKER and KERWIN dissenting, that the classification made by such act cannot be justified under even the very liberal rules on that subject, and hence the question must be answered in the affirmative, requiring the defendant's motion to quash the writ of *mandamus* upon the ground that such act is unconstitutional to be granted.

By the Court.—It is so ordered, and the proceedings dismissed.

WINSLOW, J. C. (*dissenting*). My opinion is that a mining right is a property right of such a markedly different character from that of other forms of property that it may properly be the subject of classification, provided the uniformity rule of taxation be not violated. The peculiar character of the property right in question is fully set forth in *Gadow v. Hunholz,* 160 Wis. 293, 151 N. W. 810.

SIEBECKER and KERWIN, JJ., concur in the foregoing dissent.

The following opinion was filed June 23, 1915:

TIMLIN, J. (*concurring*). Upon an equal division of the members of the court I was called upon to cast the deciding vote in this case. I think the interests of the bench and bar and of the public require some more explicit statement of the reasons upon which my conclusion rests.

1. I first inquire, What is the nature and purpose of the statute under consideration, sec. 1042*j*, Stats. 1913?

The statute does not expressly include rights in and to ores or minerals excepted from a grant of land. Where a grant of this kind is drafted by a competent person and it is desired to separate the ownership of the ores and minerals from the ownership of the land for other purposes, this is accomplished by an exception from the grant of the ores and minerals together with a reservation of the right to enter upon the land, explore and mine for such ores. There are two reasons why this statute should be taken to include exceptions and express grants as well as reservations, although the former is not within the express words of the statute: (a) because there is a decision of this court relative to construction of deeds which holds that, when it is apparent from the subject matter and from other provisions in the deed that such was the intention of the parties, an exception may be created by language like that used in this statute. (b) In order to

uphold if possible the constitutionality of the statute, it ought to be held that this statute covers all property rights or title in and to minerals and mining rights held or owned by others than the owner of the surface rights in the land. For surely upon a test of uniformity or of equal protection of the laws this statute could better meet that test if it includes estates or rights in ores and minerals created by exception or express grant than if it merely applied to rights to enter, mine, etc., created by reservation. The reasons for this are obvious.

The statute carries with it on its face some indications of a purpose to accomplish, under the guise of a taxing law, the result of extinguishing all right or title in ores or minerals in or under land outstanding in a third person separate from the surface rights and to bestow such rights upon the person who may for the time being own the surface rights to the land. But a statute with this interpretation would not meet the constitutional tests above mentioned as strongly as a statute for the purpose of raising revenue by taxation. (a) For centuries it has been common law that there may be different estates and interests in the same piece of land,—tenancy in common, life estates, estates for years, remainder, reversions, easements, limited fees, rights of piscary or turbary, title to standing and growing timber, rights to quarry, or rights to minerals in or under the surface. This precludes any theory that such multiplication of estates in a single tract of land is detrimental to public welfare so as to call for any exercise of the police power. On the contrary it has been generally agreed by lawyers, statesmen, and publicists that any policy which increases the number of proprietors in the commonwealth is beneficial rather than injurious in its tendency. (b) Underhand or improper purposes are not to be attributed to the legislature.

First conclusion. So that in deference to the rule of constitutional law which requires us to hold every statute constitutional unless we are satisfied beyond a reasonable doubt to

the contrary, we must treat this statute as a taxing statute enacted for the purpose of raising revenue for governmental purposes and as including within its scope all cases in which by exception, reservation, or express grant the title to ores and minerals in land, together with the right of exploring for and mining the same, are vested in some person or persons other than the person or persons who own title to the land and its beneficial use for any and all other purposes.

2. I do not rest this case solely on the question of the validity of the statute under sec. 1, art. VIII, Const. of Wis. I also consider its validity under the Fourteenth amendment to the paramount federal constitution, (a) because it has been customary in this court to consider these constitutional requirements together. *Black v. State,* 113 Wis. 205, 89 N. W. 522; *State v. Whitcom,* 122 Wis. 110, 99 N. W. 468; *Lawrence University v. Outagamie Co.* 150 Wis. 244, 136 N. W. 619, and cases cited. (b) Because if it conflicts with the paramount constitution it must fall notwithstanding it might be thought capable of enforcement under our state constitution. (c) It might be well to rest it wholly on the federal constitution. I would have been willing to so rest it and say nothing about the state constitution, out of deference to the minority opinion and to facilitate the review of the decision in the supreme court of the United States by those hereafter claiming title under this statute.

3. The arbitrary imposition of unequal burdens upon persons between whom no substantial distinction germane to the purposes and objects of the law can be made is forbidden by the state and federal constitutions in matters of taxation as well as in other matters. This distinction or difference necessary to uphold the classification must be one which has some relation to the legal capacity of the person, as infancy, coverture, lunacy, idiocy, alienage, etc., or to the nature and qualities of the property discriminated against, as, for example, dangerous or nondangerous property, or to the proper

objects sought to be achieved by the legislature. For instance: inequality of burden based upon stature, complexion, political belief, or upon insignificant or immaterial distinctions in the nature and qualities of property, or upon differences having in them nothing germane to the proper object sought to be attained by the statute, would not be permissible inequality. The statute in question affords a good illustration. The value of the use and occupation, and from this and other data the market value of land, is ascertainable. The existence or value of ores or minerals beneath the surface undisclosed is not easily ascertainable, but might be known to the owner if he has drilled and tested the land. This is a distinction cognate to the purposes of the statute which would support the discrimination found in the statute requiring such owner to furnish the assessor an affidavit of value while the owners of other estates in the same tract of land are not required to do so. If this were all of the statute, the statute would be valid under either the federal or state constitution.

By other statutes all sales of real or personal property of a delinquent taxpayer are subject to competitive bidding at public auction. In the case of the sale of personal property the buyers bid up upon the price, while in the case of land they bid down upon the quantity. The bidding is as truly competitive and as much for the benefit of the delinquent taxpayer in one case as in the other. Under the statute here in review the property mentioned is returned delinquent, advertised for public sale, bidders are invited, and the property treated in all respects, except with reference to the mode of assessment, as other real property. But when the invited bidders come they are prohibited from bidding because they cannot become purchasers. No one but the state or county or the person who owns the remaining interest in the land can bid at the sale. Now if this is a taxing statute, the purpose of which is to raise revenue for state expenses, this limi-

tation of bidders is apparently not germane to but in contravention of the purpose of the statute. It also discriminates injuriously against the holder of the kind of property described because he loses the advantage of having some one purchase his mineral rights in the north one, three, ten, or twenty acres of the tract in question, leaving him the remainder. This discrimination is wholly arbitrary; there is no legitimate classification on which it can rest. It surely does not aid the state in collecting its revenue to limit the number of bidders nor to require the whole land to be sold instead of the smallest area from off the north side. There is nothing in the nature of the property or in its existence detrimental to public welfare. There is no ground for any legal classification upon which this added burden can rest. It is argued that the alleged sale is really not a sale but an absolute forfeiture. This is contrary to the language and meaning of several statutes treating the affair as a sale and not as a forfeiture. But under the constitutional rules in question the legislature could not provide for a sale at public auction with competitive bidding for the property of one delinquent taxpayer and an absolute forfeiture of the property of another delinquent taxpayer, there being nothing in the nature of the property to uphold or upon which to classify this discrimination.

It having been decided by this court that the requirement that the rule of taxation be uniform is not limited to the mere rate of taxation, I think it follows that the statute in question transgresses this requirement as well as the Fourteenth amendment to the United States constitution. "The rule of taxation" does not, I think, extend to all steps in enforcing collection of the tax. But it does extend to those important steps which are essential parts of the tax proceedings. Collection by demand or collection by enforcement process are such, and it would be intolerable, for illustration, that a certain favored class should have six months in which to pay

their taxes while others must pay in six days. (b) This statute, I think, also aims to cut off at the sale the right of redemption of the owner of the kind of property discriminated against, while leaving a three years' right of redemption to all other owners of other estates in the same tract of land. True, the redemption must be made upon penalty, paying fifteen per cent. interest, but he would be a bold innovator in the law who would hold that the equity of redemption is not a matter of great consequence. Besides this, he would be much at variance with facts and would ignore the ordinary practices prevailing in real life. But just as there was no legal foundation for classification or discrimination in the clause which deprived the owners of the ores and minerals of the advantage of competitive bidding, so there is no legal foundation for this discrimination against him with reference to the time or manner of redemption. In this latter respect the act is void under both the state and federal constitutions. (c) I consider the act invalid also in that it attempts to confer upon a stranger to the title of the ores and minerals the privilege of redemption or acquisition which it denies to the delinquent owner. This is a clear case of denying the equal protection of the law. It would be the legal equivalent of enacting that one tenant in common might acquire title to the whole under a tax sale, while the other tenant in common could not.

4. With reference to the provision making the assessor's valuation conclusive, I understand that to be conclusive except in case of fraud. That is to say, I understand the rule that fraud vitiates everything obtains here. With this qualification I think that when a duty relating to assessment is lawfully imposed on a taxpayer which he is given time and opportunity to perform, but which he fails to perform, all who fail to perform that duty constitute a class against which the valuation of the assessor, while not fraudulent, may be made conclusive.

5. If the statute in question is unconstitutional in its basic and leading provisions as aforesaid, the purchaser at the sale would acquire no title as against the owner and the state should not be coerced to audit claims or pay out money on a void sale. The part of the statute sought to be enforced here by *mandamus* is not capable of severance from those portions above held void, but expressly rests thereon and is inseparably interrelated therewith.

There is another ground of unconstitutionality which I must now mention. The provision for the state advancing money to the county, which then drops out of consideration, taken with the provision that the owner of the remaining interest in the land may redeem within three years and in many cases within a longer time, amounts in practical effect to the state advancing money for this favored person, who has an option to repay the state the amount advanced with interest and take the property or to let the state keep the property. He has three years or more within which to drill and test the land, and if he finds no ore there he will leave it to the state. If he finds ore he will redeem and become the owner. But if he has not the means to carry on drilling and exploration he will naturally turn the possession of the land for the purpose of drilling and exploration over to a drilling and exploring company which will explore and acquire title to the same. If such company finds ore it will, through the owner of the surface rights, redeem; if not, the exploring company will leave the land to the state. We may question whether a statute requiring the secretary of state to audit a demand against the state created by statute, which demand amounts to an advance by the state to one owner of a part interest in land to enable him to acquire the interest of another owner in the same land, the state acquiring nothing except interest on its loan or a right to take the ores and minerals in cases where there are none, is valid. I think it is not valid. I think it is appropriating state money for the

purpose of aiding a private enterprise. The statute by shutting out bidders prevents the state from collecting its revenues. It then provides for the state becoming the purchaser, but this state title so acquired is redeemable at the option of the owner of another separate interest in the land. This last mentioned person is under no obligation to redeem, owes no debt or duty to pay the tax, and can select all the valuable mineral rights and become the owner thereof and leave those that are nonexistent or worthless to the state. As to all mineral rights redeemed, the state is merely advancing money for the benefit of one who is in the law a stranger to the interest sold for taxes. As to all mineral rights unredeemed by this favored person, the state is endeavoring to acquire title, not to collect taxes.

LYONS, Respondent, vs. ROSSMEISSL and another, Appellants.

April 13—June 16, 1915.

Party walls: Contracts: Adjoining landowners: Common use of strip.

Where plaintiff and defendants, who owned adjoining lots and had the right to use in common a three-foot strip of which the fee was in defendants, duly executed a written agreement by which plaintiff, who was about to erect a three-story building, was given the right to build a party wall in accordance with her plans and specifications, partly upon said strip and partly on defendants' land, and it was provided that such wall should be "of sufficient strength to be used for and constitute the west wall of first party's brick building she is to erect and also the east wall of any brick building of a like number of stories or less which second parties . . . may hereafter build upon their lot," such agreement, together with the construction of the wall and the subsequent acts of the parties, defined and fixed their respective rights as to the three-foot strip and the beneficial use thereof during the existence of the buildings contemplated by the agreement, apportioning between them, in accordance with the location of the party wall, the areas on the several floors not occupied by common stairways and passageways. KERWIN, J., dissents.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

This is an action to restrain the defendants from tearing down or interfering with a party wall on the third story of the plaintiff's building constructed on the land adjacent to defendants' lot. A temporary injunction was entered against the defendants pending the action. The defendants put in issue the material allegations of the complaint and set up several counterclaims. The controversy arose out of the relative rights of the parties under the following agreement:

"Articles of agreement, made and entered into this 16th day of August, 1897, by and between *Bertha Lyons* of the first part and *J. & M. Rossmeissl* of the second part, all of the city of Appleton, Outagamie county, Wisconsin, witnesseth:

"First. The party of the first part being the owner in fee of the following described piece or parcel of land, situated in the Second ward of said city of Appleton, to wit, the east twenty (20) feet of the west eighty-seven and forty one-hundredths (87 40-100) feet of the north one hundred (100) feet of block five (5), in the Second ward of the city of Appleton; also an undivided interest in that strip of land three (3) feet wide east and west and one hundred (100) feet long north and south, which adjoins said premises on the west, and which strip has been reserved for common use by adjacent owners; together with the perpetual right of way in common with the adjacent proprietors over that certain twenty (20) feet alley as now laid out extending easterly and westerly and abutting said premises on the south; and the parties of the second part being the owners in fee of the adjoining lot and premises on the west, hereby for and in consideration of the covenants hereinafter contained agree as follows:

"Second. The parties of the second part authorize, empower, and grant unto first party the right to erect and construct a party wall partly on the dividing line between said properties and premises and partly on the premises of second parties, which line runs as follows: Commencing at the curb or outer edge of the sidewalk in the center line of said three-feet reservation 'for common use by adjacent owners' and

running thence south twelve (12) feet; thence west three (3) feet two (2) inches; thence south thirty-two (32) feet; thence east three (3) feet two (2) inches to said center line; thence south thirty-nine (39) feet five (5) inches; thence west three (3) feet two (2) inches; thence south twenty-eight (28) feet seven (7) inches to the south end of said one hundred (100) feet, allowing in addition the usual footing for the foundation wall; the said foundation and walls for the three-story building to be built of brick above the stone foundation, and thickness and height to be according to the plans, drawings, and specifications of Philip Dean, architect, for first party's building, and to be one hundred (100) feet in depth back from College avenue; first party to build between the front and rear stairway (as located on said plans and specifications) two stone abutments on which shall be set and placed two iron columns to support the iron I-beams above, and on the third story there shall be a row of I-beams and columns for the support of the roof and third-story ceiling—these columns and I-beams to be built in with masonry so as to form the outside west wall; the first party to furnish all the materials therefor and pay and discharge all claims for the construction and completion of the same—all to be done and completed according to said plans, drawings, and specifications; said foundation, wall, abutments, columns, I-beams, stairs, and stairway (to be built and completed front and rear by first party) to be composed of good material for the purpose and done in a workmanlike manner, including painting, etc., so as to be a complete job; said foundations, abutments, walls, etc., shall be of sufficient strength to be used for and constitute the west wall of first party's brick building she is to erect and also the east wall of any brick building of a like number of stories or less which second parties or their heirs or assigns may hereafter build upon their lot, and chimney flues to be put in west side of said wall (as per said plans, drawings, and specifications); and second parties, their heirs or assigns, shall have the right to use said walls, stairs, stairways, pillars, abutments, columns, etc., for any and all purposes necessary to the use and enjoyment of second parties' lot so long as first party's building shall stand (and in case second parties, their heirs or assigns, shall have erected a building on their land previous to the destruction of first party's contemplated building, then so long as both or either

such buildings shall stand). The second parties, however, agree and bind themselves, their and each of their heirs and assigns, that when they or either of them shall erect a building on their lot and land, they or either of them will pay one half (½) the cost and value of said wall, abutments, columns, beams, stairs, stairways, woodwork, etc., when actually used for the building on their said lot and not before, the amount, price, value, and sum to be paid for shall be the actual cost thereof at the time when actually furnished, completed, and erected, and to be the contract price and prices at which the same shall be let and contracted for and built, to be ascertained, fixed, and determined by said architect or the agreement of the parties hereto, or, in case of the death of said architect, and the parties cannot agree on said sum, then by common-law arbitration, each of the parties choosing a competent disinterested person, and the two so chosen to select a third, and a decision of a majority to be final and conclusive, but the amount not to exceed the cost and contract price aforesaid and to be inserted in this agreement and the duplicate thereof by the parties or one of them or said architect, the payment to be made before the building is begun to be built on second parties' lot; the amount of said cost as fixed is eleven hundred and thirty-six and 12-100 dollars; and in building and connecting with said walls, etc., no connections of woodwork, such as joists, etc., shall be made to connect with woodwork of first party's building.

"Third. It is agreed by the parties that, in order to widen said stairways and entrances thereto, each of said parties shall allow to be included therein from their respective lots two (2) inches more of land.

"Fourth. These articles of agreement shall bind the parties hereto mutually and inure to their benefit, and bind and inure to the benefit of their respective heirs and assigns.

"In witness whereof, the parties have hereto set their hands and seals the day and year first above written: first party by her own proper name, and second parties in their individual and copartnership names.

"In presence of	BERTHA LYONS.	(Seal.)
"Henry D. Ryan.	J. & M. ROSSMEISSL.	(Seal.)
"M. Lyons.	JOS. ROSSMEISSL.	(Seal.)
	MATH. ROSSMEISSL.	(Seal.)"

The agreement was duly acknowledged August 16, 1897.

The court below found, among other things, in substance, that immediately upon the execution of the contract referred to in the statement of facts the plaintiff erected a three-story brick building for store, offices, and lodge rooms in accordance with plans and specifications referred to in said agreement; that said building was completed in 1898 in accordance with the plans and specifications, the party wall being the west line of the building, and said wall was located, placed, and constructed in accordance with the plans and specifications and in accordance with said agreement, and plaintiff ever since has been in the actual occupancy of said building; that during the period of construction of the plaintiff's building the defendants were engaged in business in close proximity to said building and had actual knowledge of the construction, use, and occupancy of said building; that the third story of plaintiff's building is finished off as a public hall, leased and used as such; that on October 25, 1911, the defendants, while in the process of constructing their building, threatened to tear out the party wall on the third floor, and if permitted to do so irreparable damage will result to the plaintiff; that plaintiff has offered to give defendants the right of ingress and egress to the said third story in accordance with the terms of the agreement.

The court concluded as matter of law that the plaintiff was entitled to the relief demanded and made the temporary injunctional order permanent, restraining the defendants from tearing down or injuring the party wall. Judgment was entered accordingly, from which this appeal was taken.

C. G. Cannon, for the appellants.

For the respondent there was a brief by *Julius P. Frank,* and a supplemental brief by *Julius P. Frank,* attorney, and *Olin, Butler, Stebbins, Curkeet & Stroud,* and the cause was argued orally by *Mr. Frank* and *Mr. H. L. Butler.*

SIEBECKER, J. The defendants contend that the trial court erred in restraining them from removing a part of the party wall in the third story of the plaintiff's building. The court held in effect that defendants relinquished their rights to the common use of a part of the three-foot strip by the party-wall agreement and the erection by plaintiff of her building pursuant thereto. It is without dispute that at the time this party-wall contract was made the parties had an undivided interest in the common use of the three-foot strip. The contract recognizes it. It appears that plaintiff at the time the contract was made proposed erecting a three-story building on her lot. In executing this purpose she desired to use and occupy, to the extent of her interest, the three-foot strip in connection therewith. The parties undertook to arrange for such use by the party-wall agreement. Under these circumstances the effect of the contract and the construction of the party wall and building by the plaintiff constitute the basis upon which the rights of the parties in this three-foot strip are to be determined. The plaintiff contends that the provisions of this agreement fix and establish the beneficial use of this strip during the life of her three-story building and the one which the defendants contemplated building when the contract was made. The contract grants to the plaintiff the right to erect the party wall on the designated dividing line between said properties and partly on the premises of the defendants; that it was to be constructed according to the plans, drawings, and specifications there exhibited to the parties; that two iron columns were to be placed on the abutments between front and rear stairway, as located in the architect's plans, for the support of the I-beams above, "and on the third story there shall be a row of I-beams and columns for the support of the roof and third-story ceiling—these columns and I-beams to be built in with masonry so as to form the outside west wall." Another provision is: "said

foundations, abutments, walls, etc., shall be of sufficient strength to be used for and constitute the west wall of first party's brick building she is to erect and also the east wall of any brick building of a like number of stories or less which second parties or their heirs and assigns may hereafter build upon their lot." These provisions clearly indicate that the parties intended this wall as the division line of the buildings on their respective lots and necessarily granted to plaintiff the right to inclose the parts of the area, occupied by her building, of the three-foot strip, subject to such right of its use in common as the contract specified. The acts of the parties pursuant to this agreement show that it was understood that their common uses of the strip were fixed and established in connection with their contemplated buildings. They so carried out the contract, and pursuant thereto have occupied the strip on the first and second story of plaintiff's building without controversy. The finding of the trial court that the building was erected pursuant to the plans approved in the contract cannot be disturbed under the facts and circumstances of the case. It must also be considered that the west wall of plaintiff's building is the partition wall between the plaintiff's and defendants' buildings as agreed upon in the contract. The main contention of the defendants rests upon the claim that its right to one half or to the whole of the three-foot strip on the third floor of plaintiff's building is appurtenant to their interest in the fee of such strip, and that they have not relinquished any of their original interest in or right to any beneficial use of the strip. This claim conflicts with the rights granted the plaintiff by the party-wall agreement, which authorized the plaintiff to inclose the portions of this strip lying on the east of the wall, as shown by the architect's plan of her proposed building. The execution of this plan under the party-wall agreement operated to establish the plaintiff's and defendants' rights respectively to the beneficial use of their common interest in this strip. We find no basis for defendants' claim that no such results were

contemplated and intended by the parties when they entered into this contract. Applying the context of the parts of the contract stated above to the subject matter, there is evinced a purpose and intent by the parties to apportion their rights and beneficial uses in this strip, and that such apportionment thereof was in fact established by erecting the party wall as agreed and in using the area of such strip as divided by the party wall. In legal effect these acts constitute a mutual relinquishment thereof to such parts as were not to be used in common under the arrangements embodied in the contract and in the plans and specifications of plaintiff's building, as approved thereby. The result of these transactions is that plaintiff and defendants occupied a part of this strip in common with stair- and passage-ways, and the parts not so occupied by common stair- and passage-ways were apportioned between the parties in accordance with the location of the party wall and the approved plans of plaintiff's building. The evidence sustains the conclusion that the parties gave this party-wall contract a practical construction in harmony with this interpretation of it. Upon these considerations it must follow as a legal conclusion that the contract defined the rights of the parties as to the three-foot strip and fixed the extent of their beneficial use thereof during the existence of plaintiff's proposed building and the contemplated building of the defendants in connection with the proposed party wall. The execution of the agreement, as shown by the evidence, conferred upon the plaintiff the right to use the areas on the respective floors inclosed by the party wall on her side thereof, except the portions which were assigned and occupied by them in common for purposes of stair- and passage-ways and the part defendants occupy on the second floor as toilets, off from the common passageway. *Wallis v. First Nat. Bank,* 155 Wis. 306, 143 N. W. 670. The defendants therefore had no right to take down the partition wall on the third floor for the purpose of entering the area of the three-foot strip allotted to plaintiff under the contract. The judgment

of the trial court properly restrained defendants from making the threatened entry into plaintiff's building on the third floor through the party wall.

By the Court.—The judgment appealed from is affirmed.

The following opinion was filed July 8, 1915:

KERWIN, J. (*dissenting*). I cannot agree with the majority of the court. I think the judgment below should be reversed for the following reasons:

(1) At the time the party-wall agreement was made the title to the three-foot strip was in defendants, subject to an easement in plaintiff for stairway and hall purposes in common with defendants. (2) The title has never been transferred to plaintiff, unless the party-wall contract and the acts of the parties under it had that effect. (3) There is nothing in the party-wall contract impairing the title of defendants. (4) The party-wall contract recognizes the continuing rights of the defendants as owners subject to the easement in plaintiff. At least there is no relinquishment. (5) The manner of construction of the wall supports the idea that the parties understood that the defendants' interest in the strip continued. (6) The evidence and manner of construction of the wall rebuts any presumption that defendants relinquished their interest in the three-foot strip. (7) On the admitted facts no rights have been acquired by plaintiff by estoppel, waiver, or acquiescence. (8) I think the defendants are the owners in fee of the three-foot strip subject to the easement in plaintiff. (9) But in any event the defendants are at least tenants in common with plaintiff of the three-foot strip and are entitled to equal enjoyment with plaintiff of all space embraced within the three-foot strip not occupied by stairways, halls, or supports for plaintiff's building.

Claim was made, but not strenuously pressed, that rights were acquired by plaintiff in the three-foot strip by adverse possession or estoppel. This contention is wholly unsupported by the record and is not made the basis of the decision

of the court. The real contention of plaintiff, and the one upon which the opinion of the court rests, as I understand it, is that the defendants in some way relinquished their rights in the three-foot strip by force of the party-wall contract and the construction of the wall.

In order to support the opinion of this court and warrant an affirmance of the judgment below it must appear that the rights of the defendants in the three-foot strip were relinquished either by the terms of the contract, or by the terms of the contract and the acts of the parties under it. Upon the undisputed evidence neither position can be sustained.

The defendants owned property west of and adjacent to plaintiff's property, described in a warranty deed to them as follows:

"Commencing in the south line of College avenue and the north line of block five (5) of the Appleton plat in the Second ward, city of Appleton, and seventy-five (75) feet west of the center of said block five (5), and thence running west twenty-three (23) feet, thence south one hundred and twenty (120) feet, thence east twenty-three (23) feet, thence north one hundred and twenty (120) feet to College avenue to the place of beginning. Being same land described in volume 47 of Deeds, page 468. Reserving therefrom the unobstructed right of way for travel with teams over the south twenty (20) feet of the above described land and reserving therefrom the right of way over the east three (3) feet to be occupied and used jointly and forever by and between the two owners of this tract and the adjoining twenty (20) feet east of this described tract."

The above conveyance covers the three feet in question, and the only interest which plaintiff had when the party-wall contract was made was the right of way described in the conveyance to defendants.

Assuming to act under the agreement set out in the statement of facts, the plaintiff in 1897 and 1898 constructed a three-story building upon her property. Although the court found that the building was constructed according to plans

and specifications there is no proof that it was so built, unless it can be inferred from the evidence that the building was constructed and that there were plans and specifications. It appears from the record that the wall was not built upon the line described in the contract, but was built upon the following described line: Starting at the east line of defendants' lot and the west line of the three feet, running south from the north end of the building thirty-two feet, then jogged to the east one and one-half feet, then south thirty-nine feet, then jogged back to the west one and one-half feet to the west line of the three feet, and then ran on said line south to the end of the lot. On each end of this jog thirty-nine feet long and on the west line of the three feet were placed stone abutments upon which rested I-beams to support the wall above. Over these I-beams and on a line with the west line of the three feet the wall was extended through the second to the third story, and I-beams placed in the wall between the second and third stories. Front and rear stairways were built from the first to the second story, and a rear stairway only from the second to the third story.

The defendants constructed their building in 1911, and when they reached the second story the wall on that floor was torn out front and rear to afford defendants access to their offices and to run a stairway in the rear to the third story. The space on the second floor between the front and rear stairways was occupied by toilets in the center, leaving a passageway on each side, the toilets on the west side being for the use of defendants' tenants and on the east side for plaintiff's tenants, and doors provided openings for passage to hallways into the offices on either side. Defendants built their own stairway west of the wall from the second to the third floor.

In the construction of their building the defendants attempted to break out the wall north of the rear stairway, claiming the right to the whole or part of the three-foot space

east of the wall and not occupied in common and included in the plaintiff's inclosure on the third floor east of the wall. The injunction awarded below restrained such interference.

It appears from the evidence that no wall was called for in the specifications on the third floor, but it was extended directly over the wall on the second floor and on the west line of the three feet, and I-beams constructed therein so that the wall could be removed and the beams remain to support the structure above.

The evidence also shows that blind doors or openings were left in the wall on the second and third floors, and that there was some talk of using the third floor over both buildings as a common hall; also that the beams were placed in the wall on the third floor so that the wall could be removed, leaving the beams for support.

The production of the plans and specifications of plaintiff's building was demanded by defendants upon the trial below, but they were not produced and no proof made of their contents.

There is no evidence that the defendants consented or agreed that the party wall constructed by plaintiff should be the dividing line between the real estate of plaintiff and defendants, unless it can be said that the contract and acts of the parties under it furnish such evidence. There is no evidence that the defendants acquiesced in the manner of the construction of plaintiff's building or relinquished their rights in the three-foot strip. The deed in evidence shows title in defendants of the three-foot strip subject to the easement in plaintiff, and the party-wall contract recites that the plaintiff has "an undivided interest in that strip of land three feet wide east and west, and one hundred feet long north and south, which adjoins said premises on the west, and which strip has been reserved for common use by adjacent owners." Counsel for plaintiff in their brief say: "But it is undisputed that the rights of plaintiff and defendants in

and to this three-foot strip are equal and the same." This is the most favorable construction to plaintiff that the record will bear. The acts of the plaintiff in constructing the wall seem to indicate that that was her construction of the party-wall contract, because on the first floor the wall in the middle and between the stairways was constructed in the center of the three-foot strip, and on the second floor the three-foot strip was used in common without objection from plaintiff. So there is nothing in the evidence, aside from the express terms of the party-wall contract, which tends in the slightest degree to show that the defendants relinquished any of their rights in the three-foot strip.

The opinion of the court seems to be based upon the theory that the following part of the contract has that effect, namely:

"And on the third story there shall be a row of I-beams and columns for the support of the roof and third-story ceiling, and these columns and I-beams to be built in with masonry so as to form the outside west wall." . . . "Said foundations, abutments, walls, etc., shall be of sufficient strength to be used for and constitute the west wall of the first party's brick building she is to erect and also the east wall of any brick building of a like number of stories or less which second parties or their heirs and assigns may hereafter build upon their lot."

Now, assuming as most favorable to the plaintiff that the defendants were tenants in common with plaintiff in the three-foot strip, these provisions did not transfer to the plaintiff all the defendants' interest in the three-foot strip on the third floor. The fact that the wall was to be used as the west wall of plaintiff's building and the east wall of the defendants' building did not transfer the defendants' interest in the whole strip to plaintiff, or deprive the defendants of their right to use the space in common with plaintiff in any manner not inconsistent with the easement in the same in the same manner that the first and second floors were used. The manner of construction and the evidence show that there was no relinquishment by defendants of their interest.

The decision of this court holds that the party-wall contract and construction of the wall under it had the effect of depriving the defendants of all use of the three-foot strip not occupied by the rear stairway and opening and gives the exclusive use of all the unoccupied space on the third floor over the three-foot strip to plaintiff. This in my opinion is wrong. The defendants cannot be divested of their interest in the three-foot strip by assumption or presumption. Sec. 2302, Stats. The party-wall contract does not convey to plaintiff the defendants' interest in the land upon which the wall stands, much less the part of the three-foot strip east of the wall. *Andrae v. Haseltine,* 58 Wis. 395, 17 N. W. 18; Washburn, Easem. & Serv. (3d ed.) 564.

UNITED STATES GLUE COMPANY, Respondent, vs. TOWN OF OAK CREEK, Appellant.

May 6—June 16, 1915.

Taxation: Situs of income: "Derived from business transacted within the state:" Sale of manufactured products outside of state: Interstate commerce: Constitutional law.

1. The income of a domestic manufacturing corporation derived from the sale of its products, manufactured in this state, to customers in this and other states, whether delivered directly from the factory to such customers or shipped to branch houses in other states and thence delivered to customers residing outside of the state on sales made either by the home office or by the branch houses, was income "derived from business transacted and property located within the state," within the meaning of sub. 3, sec. 1087*m*—2, Stats. 1911.
2. The fact that the business so conducted involved transactions in interstate commerce did not affect the situs of the income; nor did the imposition by the state of a tax upon such income contravene sec. 8, art. I, Const. of U. S., conferring upon Congress the power to regulate commerce between the states.
3. That part of the income of such a corporation which was derived from goods produced and purchased outside of the state and

shipped, either directly or by way of the home office in this state, to branch houses in other states and thence sold and delivered to customers without the state, was not attributable to business transacted within the state and was not taxable under the statute.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Reversed.*

The plaintiff brought this action to recover the sum of $2,835.38 with interest from January 29, 1913. Plaintiff, under protest, paid this sum to defendant as income tax and claims it was in excess of the amount lawfully due from it as income tax on its income for the year 1911 and assessed in the year 1912.

The plaintiff is a corporation organized under the laws of this state and is located and has its principal place of business at Carrollville in the town of *Oak Creek,* Milwaukee county. The plaintiff conducted the business of manufacturing glue, gelatine, grease, and other products and sold these products in this and other states of the United States and in foreign countries. Its manufacturing was done at its plant in the town of *Oak Creek,* the defendant in this action. It maintained general offices at its plant in Carrollville and conducted all of its business there, except such as was conducted at its established branch business places in the cities of Boston, Massachusetts; New York City, New York; Chicago, Illinois; Cincinnati, Ohio; Richmond, Virginia; and Grand Rapids, Michigan. At these places the plaintiff carried stocks of its goods. Each place was in charge of a manager, who employed traveling men to solicit orders for goods. A part of the goods covered by orders obtained by salesmen were shipped to the purchasers from the stocks at these branches, and the rest of such orders were sent by the managers to the plaintiff's headquarters at Carrollville and the goods called for by them were shipped from the factory at Carrollville. The stock of goods at these branches was in part manufactured at the factory in Carrollville and sent to

the branch houses before sale thereof, and the rest of the goods at these branches the plaintiff purchased from manufacturers and dealers outside of this state and were shipped from the places of purchase either directly or by way of plaintiff's factory to these branches.

The parties agreed upon the material facts of the case and stipulated that in 1911 —

(1) The value of plaintiff's property within the state was $753,181.61. The value of its property within and without the state was $1,060,900.

(2) Plaintiff's income from rentals, stocks, bonds, securities, or evidences of indebtedness was $10,390.81.

(3) Plaintiff's income from its business (exclusive of the above item of $10,390.81) for 1911 was $1,279,850.71, which is designated hereafter as its business income.

(4) The state tax commission computed plaintiff's net "business income" for 1911 at $143,200. After making the deductions provided for by the law the tax commission computed plaintiff's taxable income for 1911 to be $66,576, upon which it assessed an income tax at the rate of six per cent., amounting to $3,994.56.

(5) In 1913 the tax commission made a reassessment of plaintiff's 1911 income to correct alleged errors in their assessment thereof in 1912, and upon their computation for reassessment found that $13,344 of plaintiff's net taxable income for 1911 had been omitted from the tax of 1912 and made an assessment thereon at the rate of six per cent., amounting to $700.64, which the plaintiff paid under protest and included in its demand of recovery in this action.

(6) It is also stipulated that the plaintiff's net "business income" for 1911 arising from the conduct of its business was derived as follows:

(a) The sum of $15,999.47 was realized from the manufacture, sale, and delivery of goods from its factory to customers residing in the state of Wisconsin.

(b) The sum of $65,103.26 was realized from the manu-

facture, sale, and delivery of goods from its factory to customers residing outside of the state of Wisconsin.

(c) The sum of $31,336.86 was realized from the manufacture of goods at the factory, sent to branch houses outside of Wisconsin, and the sale and delivery of such goods from the branch houses to customers residing outside of the state of Wisconsin.

(d) The sum of $11,444.75 was realized from the purchase of goods in the market outside of the state of Wisconsin and shipped from the place of purchase either directly or by way of plaintiff's plant at Carrollville to its branch houses, and the sale and delivery of such goods to customers residing outside of the state of Wisconsin.

The trial court adopted the facts as stipulated by the parties as its findings of fact in the case, and as conclusions of law held that plaintiff's taxable income for the year 1911 under the provisions of secs. 1087*m*—1 to 1087*m*—30, Stats. 1911, inclusive, was $10,390.81 income derived from rentals, stocks, bonds, securities, and evidences of indebtedness, and $15,999.47 of the income derived from conducting the business specified and described in the foregoing classes (a), (b), (c), and (d) as "business income," and that the income tax lawfully due thereon was the sum of $1,055.61, which tax was paid by plaintiff on the 29th day of January, 1913; that plaintiff was unlawfully required to pay the sum of $2,835.38 in excess of the lawful amount due as income tax; and the court awarded plaintiff judgment for the recovery of $2,835.38 with interest thereon from January 29, 1913. From such judgment this appeal is taken.

For the appellant there were briefs by *H. J. Killilea,* attorney, and the *Attorney General* and *Walter Drew,* deputy attorney general, of counsel, and oral argument by *Mr. Killilea.*

For the respondent there was a brief by *Lines, Spooner, Ellis & Quarles,* and oral argument by *George Lines.*

SIEBECKER, J. The Income Tax Law of 1911 provides:

"There shall be assessed, levied, collected and paid a tax upon incomes received during the year ending December 31, 1911. . . ." Sec. 1087*m*—1, Stats. 1911.

"The tax shall be assessed, levied and collected upon all income, not hereinafter exempted, received by every person residing within the state, and by every nonresident of the state upon such income as is derived from sources within the state . . . ; provided, that any person engaged in business within and without the state shall, with respect to income other than that derived from rentals, stocks, bonds, securities or evidences of indebtedness, be taxed only upon that proportion of such income as is derived from business transacted and property located within the state, which shall be determined in the manner specified in subdivision (e) [of subsection 7] of section 1770*b*, as far as applicable." Sub. 3, sec. 1087*m*—2, Stats. 1911.

The taxability of the income derived from rentals, bonds, etc., is not in controversy. All parties agree that the tax commission properly taxed this item of $10,390.81.

The defendant, the town of *Oak Creek,* contends that the court erred in holding that the part of the plaintiff's net "business income," denominated class (a) in the foregoing statement, which is derived from the manufacture, sale, and delivery of its products at its plant in Carrollville to customers in the state of Wisconsin, only, is subject to be taxed as income under the foregoing provisions of the Income Tax Law. On the part of the plaintiff it is claimed that the judgment of the trial court is correct, upon the ground that the net "business income" derived by plaintiff from the manufacture, sale, and delivery of its goods to customers in this state constitutes the net income derived from business transacted and located within this state in the sense of this law, and that the "business income" derived from goods sold to customers outside of the state, whether manufactured at and shipped from its factory at Carrollville or purchased outside of this state and then delivered from its branch houses, was

derived from transactions in interstate commerce and therefore not taxable, because it is a burden on such commerce and is repugnant to sec. 8 of art. I of the constitution of the United States, whereby is conferred on Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

The question naturally arises, first, what portion of plaintiff's net "business income" is income "derived from business transacted and property located within the state," and subject to the tax upon incomes? We are of the opinion that this provision of the statute includes all of plaintiff's net "business income" derived from the manufacture, sale, and delivery of such of its products as were manufactured at, sold, and delivered from the factory to customers in Wisconsin and other states, and the net "business income" of its products which were manufactured at its factory at Carrollville and shipped from there to its branch houses out of the state and delivered from there to customers residing outside of the state, on sales made either at Carrollville or at the branch houses. The trial court held that the net "business income" of the sales of the latter class (embraced in classes (b) and (c) of the foregoing statement) was not subject to an income tax, because such portion of plaintiff's income is not "derived from business transacted and property located within the state." This court in *State ex rel. Arpin v. Eberhardt,* 158 Wis. 20, 147 N. W. 1016, had under consideration the provisions of these statutes involving this question and interpreted them to the effect that the income of a person residing in the state, other than that derived from rentals, stocks, bonds, securities, and evidences of indebtedness, is taxable if derived from sources within the state, and income derived from sources without the state is not taxable under the statutes. The plaintiff's business enterprise, in the light of the income statutes, must be considered in a twofold character as respects income producing. In its cor-

porate existence it is a unit, with its principal business and headquarters located at Carrollville. In its business aspects it is divided into two parts, one located and conducted at its headquarters at Carrollville and the other located and conducted at its branches in the designated cities of other states. It is well understood that many elements of business other than the use of capital or the service of employees to perform the necessary labor enter into the production of an income in the sense involved in taxation, and that the sources of such income are not absolutely separable one from the other. The observations of the court in *Wilcox v. County Comm'rs,* 103 Mass. 544, are enlightening and helpful. Income in the sense of tax laws is not the capital or stocks of goods in which the capital may be expended:

"It is the net result of many combined influences: the use of the capital invested; the personal labor and services of the members of the firm; the skill and ability with which they lay in, or from time to time renew, their stock; the carefulness and good judgment with which they sell and give credit; and the foresight and address with which they hold themselves prepared for the fluctuations and contingencies affecting the general commerce and business of the country."

The statute is to receive a practical interpretation. This court recently said on the subject:

"Philosophical and logical distinctions must yield to the clearly expressed intent of the written law and to the possibility of a practical administration thereof." *State ex rel. Manitowoc Gas Co. v. Wis. Tax Comm., ante,* p. 111, 152 N. W. 848. "If an income be taxed the recipient thereof must have a domicile within the state, or the property or business out of which the income issues must be situated within the state so that the income may be said to have a situs therein. . . . The Income Tax Law does not seek to reach property or an interest in property as such, but to reach incomes having a situs in the state, or growing out of a privilege exercised or occupation conducted within the state." *Ibid.*

The plaintiff, as recipient of its corporate income, whatever its source, has a domicile in this state, and the principal part of its property and its business which is employed in the transactions out of which the income issues is located in this state. The statute seeks to tax the part of this income which has its source in this state. The fact that the business so conducted may involve transactions in interstate commerce cannot affect the situs of the income. Nor does the fact that goods manufactured at Carrollville are sold without the state affect the source of the income. The income so derived is the result of the business carried on at Carrollville in this state. The place of sale of such products does not change the place of business from this to the state where the goods are sold. The statute does not contemplate such a result and clearly intends that the source of the income is at the place where the business is carried on. The transactions involved in producing the products at the plant at Carrollville and disposing of them through intrastate or interstate transactions are in substance and effect transacting business in this state, and the shipping and delivery of such goods on sales made at home or abroad, from either the factory or branch houses to which they had been shipped before sale, are no more than incidents in transacting the business of supplying the articles to customers in their finished state. We cannot, in the light of the nature of the general conduct of the business, assent to the claim that the shipping and delivery of goods, manufactured at the plant, from branch houses are the controlling elements of such transactions and that they give such business a situs without the state. The manufacture, the management, and the conduct of the business at the home office are the controlling features in the process of disposing of the article produced at the factory and constitute the source out of which the income issues and give it a situs within the state under the Income Tax Law.

The income derived from goods which were produced and

purchased outside of the state and shipped, either directly or by way of plaintiff's factory at Carrollville, to plaintiff's branch houses and thence sold and delivered to customers without the state, is clearly a separable class of plaintiff's business. Such business is transacted and located without the state, excepting incidental management from and accounting for the result thereof to plaintiff's principal office at Carrollville. The carrying on of this part of the trade, according to the findings of fact, produced an income which issued out of the business and property located without the state. Under the facts and circumstances showing the manner of conducting this part of the plaintiff's business, it must be held that the income derived therefrom is attributable to the business conducted without the state and hence not taxable under the law.

The plaintiff contends that the judgment of the trial court must stand, because all income of the plaintiff derived from business conducted in this state, except that portion derived from goods sold to customers in this state, is derived from transactions in interstate commerce, and the imposition of a tax on such income is repugnant to plaintiff's rights under sec. 8 of art. I of the constitution of the United States, providing that: "The Congress shall have power: To regulate commerce with foreign nations, and among the several states, and with the Indian tribes." The defendant urges that there is no such conflict between the powers thus granted to Congress and the powers exerted by the legislature under the state Income Tax Law. The power of a state to tax its people and their property in all the recognized ways of levying and collecting taxes is an acknowledged attribute of its sovereignty, which it may exert to the fullest extent for the purpose of providing revenue to defray the expenses of conducting the government. In exerting this governmental function it is not permitted to levy and collect taxes on any instrumentalities or property employed by the federal govern-

ment to carry its powers into execution. *McCulloch v. Maryland,* 4 Wheat. 316, and subsequent cases.

" . . . No state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress." *Leloup v. Port of Mobile,* 127 U. S. 640, 648, 8 Sup. Ct. 1380.

The foregoing is the conclusion as stated by BRADLEY, J., who delivered the opinion for the court, and he cites thereto a large number of cases. This established doctrine is followed in many subsequent cases. The question had received extensive examination and elaboration in *Philadelphia & S. S. Co. v. Pennsylvania,* 122 U. S. 326, 7 Sup. Ct. 1118, involving a tax imposed by the state of Pennsylvania on gross receipts of a steamship company conducting an interstate traffic, which was held a burden on interstate commerce and hence repugnant to the exclusive power of Congress to regulate such commerce. BRADLEY, J., delivered the opinion of the court in this case also, in which he discussed at length the reasons and grounds of the conclusion reached, namely, that the tax on the gross receipts of such business, as such, is a tax on such business, because " . . . they were received for transportation. No doubt a shipowner, like any other citizen, may be personally taxed for the amount of his property or estate, without regard to the source from which it was derived, whether from commerce, or banking, or any other employment. But that is an entirely different thing from laying a special tax upon his receipts in a particular employment." In a part of the opinion this learned jurist answers for the court the claim made that the tax in question was in the nature of an income tax, and declares that:

"It is not a general tax upon the incomes of all the inhabitants of the state; but a special tax on transportation com-

panies. . . . As a tax on transportation . . . it cannot be supported where that transportation is an ingredient of interstate or foreign commerce, even though the law imposing the tax be expressed in such general terms as to include receipts from transportation which are properly taxable."

The result of the court's consideration of the question led it to declare that:

"The corporate franchises, the property, the business, the income of corporations created by a state may undoubtedly be taxed by the state; but in imposing such taxes care should be taken not to interfere with or hamper, directly or by indirection, interstate or foreign commerce, or any other matter exclusively within the jurisdiction of the federal government."

The laying and collecting of an income tax by a state imposes a burden on its citizens wholly unlike a tax upon their business or commerce. The tax in question does not refer to nor is it in the nature of a tax burden laid on the business, the gross receipts, or the property employed in interstate commerce. In fact the tax deals only with that part of the fruits of such commerce which remains as the net proceeds after all the immediate burdens of the commerce have been discharged and such net profits are merged in the assets of the corporation. The income tax is in effect not unlike the tax which was imposed on corporations under the act of Congress in the Tariff Act of 1909 and known as the "Corporation Tax." This law imposed a tax on incomes of corporations from *all sources.* In the case of *Flint v. Stone Tracy Co.* 220 U. S. 107, 31 Sup. Ct. 342, it was urged upon the court that this tax was invalid because the income taxed was in part derived from business of corporations engaged in interstate commerce. The court held that the burden imposed was " . . . a tax upon the doing of business with the advantages which inhere in the peculiarities of corporate or joint-stock organizations of the character described." The act involved incomes derived from business transactions involving

interstate commerce under the exclusive control of the federal government and from sources which were nontaxable under the constitution and laws of the federal government, and the claim was pressed upon the court that these features of the act invalidated the tax on income derived from such sources. But the court rejected the contention, declaring:

"It is therefore well settled by the decisions of this court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation, as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is nontaxable. Applying that doctrine to this case, the measure of taxation being the income of the corporation from all sources, as that is but the measure of a privilege tax within the lawful authority of Congress to impose, it is no valid objection that this measure includes, in part at least, property which as such could not be directly taxed." Page 165.

We are of the opinion that the tax imposed by the Income Tax Law of this state does not impose a burden on the business or property of plaintiff in any sense repugnant to its rights under the provision of the federal constitution conferring on Congress the right to regulate commerce between the states, and that the trial court erred in holding that the income tax imposed by the tax commission was excessive and in awarding recovery for the amount of such alleged excess with interest.

By the Court.—The judgment appealed from is reversed, and the cause remanded to the circuit court with direction to award judgment dismissing plaintiff's complaint.

BARNES, J., dissents.

CASES DETERMINED

AT THE

August Term, 1915.

TAYLOR, Administratrix, Respondent, vs. NORTHERN COAL & DOCK COMPANY, Appellant.

April 14—October 5, 1915.

Negligence: Injury to licensee: Carpenter working on vessel being unloaded: Warning of increase in danger: Evidence: Contributory negligence: Instructions to jury: Burden of proof: Special verdict: Harmless errors.

1. Plaintiff's intestate, a ship carpenter who, to the knowledge of and without objection from defendant, was lawfully engaged in repairing a vessel while its cargo of coal was being unloaded at defendant's dock, was not a trespasser but was entitled at least to the privileges and protection of a licensee; and the defendant was bound to so act as not unnecessarily to increase the danger to him or render the premises more dangerous without notifying him of such fact.
2. Evidence tending to show, among other things, that said intestate and his crew had started to work on the side of the vessel under the hoisting rig by which the coal was being taken from the hold, at a time when defendant was making some repairs on such rig; that defendant knew of their presence under the rig; that in the usual operation of the rig lumps of coal dropped from the buckets; that no warning was given to deceased before the rig was started again; and that shortly after it was started a lump of coal fell and struck him, causing his death—is *held* sufficient to show negligence on the part of defendant, and not to establish contributory negligence of the deceased as matter of law; hence there was no error in refusing to direct a verdict for defendant.
3. If in such case defendant's employees knew the deceased was in a place of danger, or ought to have so known, it was their duty to give warning.

4. It was not prejudicial error to refuse requested instructions to the effect that there was no evidence that defendant's employees knew the hearing of the deceased was not acute, and that if he was hard of hearing it was his duty to govern himself accordingly—it not appearing that dullness of hearing had anything to do with the accident.
5. Refusal to submit in the special verdict a question as to an evidentiary fact not put in issue by the pleadings is not error, especially where the matter involved was sufficiently covered by the verdict submitted and the charge given.
6. It is not error to refuse to give requested instructions which are sufficiently and correctly covered by the general charge.
7. Error in the instructions as to the burden of proof upon certain questions in the special verdict is not prejudicial where such questions were immaterial and answers thereto may be treated as surplusage.

Appeal from a judgment of the circuit court for Douglas county: Martin L. Lueck, Judge. *Affirmed.*

The appeal is from a judgment entered November 16, 1914, for the sum of $4,510.54 damages and costs in an action brought for the death of one George Taylor.

The complaint contained four causes of action: the first, for injuries to and pain and suffering of deceased caused by the wanton and wilful negligence of the defendant; second, for the death of deceased caused by the wanton and wilful negligence of the defendant; third, for injuries and suffering caused by the negligence of the defendant; and fourth, for death caused by the negligence of the defendant.

The court below held that there was no wanton or wilful negligence shown and submitted the case to the jury on the causes of action for ordinary negligence. The jury returned the following verdict:

"(1) Was George Taylor warned not to be on the dock between the hoisting rigs and the boat? *A.* No.

"(2) Was said George Taylor sufficiently warned prior to the injury that he was not to work between the hoisting rig and the edge of the dock while the hoisting apparatus was in operation? *A.* No.

"(3) Did the defendant negligently fail to warn said

George Taylor of the starting of said hoisting apparatus after the repairs to the steering line had been completed? *A.* Yes.

"(4) If you answer the third question 'Yes,' then answer this question: Was such negligence the proximate cause of the injury and death of said George Taylor? *A.* Yes.

"(5) Did any want of ordinary care on the part of George Taylor contribute proximately to produce his injury? *A.* No.

"(6) What sum of money will compensate the widow for the pecuniary loss sustained by her in consequence of the death of said George Taylor? *A.* $4,000.

"(7) What sum of money will make compensation for the damages sustained by George Taylor in his lifetime in consequence of the injury received by him? *A.* $350."

Judgment was entered in favor of the plaintiff thereon and defendant appealed.

For the appellant there was a brief by *Luse, Powell & Luse,* attorneys, and *A. E. Boyesen,* of counsel, and oral argument by *L. K. Luse.* They contended, *inter alia,* that the deceased was no more than a mere licensee upon defendant's premises and that defendant owed him no duty except not to wilfully or wantonly injure him. *Hupfer v. Nat. D. Co.* 114 Wis. 279, 90 N. W. 191; *Cahill v. Layton,* 57 Wis. 600, 16 N. W. 1; *Dowd v. C., M. & St. P. R. Co.* 84 Wis. 105, 54 N. W. 24; *Peake v. Buell,* 90 Wis. 508, 63 N. W. 1053; *Muench v. Heinemann,* 119 Wis. 441, 96 N. W. 800; *Brinilson v. C. & N. W. R. Co.* 144 Wis. 614, 129 N. W. 664; *Bolin v. C., St. P., M. & O. R. Co.* 108 Wis. 333, 84 N. W. 446; Elliott, Railroads (2d ed.) § 1250; 3 Shearm. & Redf. Neg. (6th ed.) § 705; 29 Cyc. 449; *McCabe v. C., St. P., M. & O. R. Co.* 88 Wis. 531, 60 N. W. 260; *Hogan v. C., M. & St. P. R. Co.* 59 Wis. 139, 17 N. W. 632; *Davis v. C. & N. W. R. Co.* 58 Wis. 646, 17 N. W. 406; *Sutton v. N. Y. C. & H. R. R. Co.* 66 N. Y. 243; *Smith v. Day,* 86 Fed. 62; *Vanderbeck v. Hendry,* 34 N. J. Law, 467; *Cannon v. C., C., C. & St. L. R. Co.* 157 Ind. 682, 62 N. E. 8; *Shults v. C., B. & Q. R. Co.* 91 Neb. 587, 136 N. W. 834; *Bowler v. Pacific*

Mills, 200 Mass. 364, 86 N. E. 767; *Norris v. Hugh Nawn C. Co.* 206 Mass. 58, 91 N. E. 886; *Metcalfe v. Cunard S. Co.* 147 Mass. 66, 16 N. E. 701; *Larmore v. Crown Point I. Co.* 101 N. Y. 391, 4 N. E. 752; *Weitzmann v. A. L. Barber A. Co.* 190 N. Y. 452, 83 N. E. 477; *Magar v. Hammond,* 183 N. Y. 387, 76 N. E. 474; *Martin v. Louisville & J. B. Co.* 41 Ind. App. 493, 84 N. E. 360; *Habina v. Twin City E. Co.* 150 Mich. 41, 113 N. W. 586; *Neice v. C. & A. R. Co.* 254 Ill. 595, 98 N. E. 989; *Downes v. Elmira B. Co.* 179 N. Y. 136, 71 N. E. 743; *Whitney v. N. Y., N. H. & H. R. Co.* 87 Conn. 623, 89 Atl. 269; *Woolwine's Adm'r v. C. & O. R. Co.* 36 W. Va. 329, 15 S. E. 81; *Price v. P. V. & N. E. R. Co.* 15 N. Mex. 348, 110 Pac. 565; *Roche v. American Ice Co.* 140 App. Div. 341, 125 N. Y. Supp. 323; *O'Brien v. U. F. R. Co.* 209 Mass. 449, 95 N. E. 861; *Kohler v. W. J. Jennison Co.* 128 Minn. 133, 150 N. W. 235.

For the respondent there was a brief by *Grace, Hudnall & Fridley,* and oral argument by *G. B. Hudnall.* They argued, among other things, that the deceased was not a trespasser, but a licensee. The duty that the owner of premises owes to a licensee, as variously stated by the courts, is to refrain from acts of affirmative negligence rendering the premises more dangerous; he cannot increase the danger; he cannot create new perils; he cannot engage in any active misconduct toward the licensee; he cannot be guilty of any culpable want of care; he must refrain from any active negligence; he cannot make a pit, a dangerous trap or pitfall; he cannot change the situation in a manner which must necessarily be dangerous to the licensee; he cannot make the premises more dangerous, without notifying the licensee of the facts or warning him of the added danger. *Davis v. C. & N. W. R. Co.* 58 Wis. 646, 17 N. W. 406; *Dowd v. C., M. & St. P. R. Co.* 84 Wis. 105, 54 N. W. 24; *Hupfer v. Nat. D. Co.* 114 Wis. 279, 90 N. W. 191; *Muench v. Heinemann,* 119 Wis. 441, 96 N. W. 800; *Rowley v. C., M. & St. P. R. Co.*

135 Wis. 208, 115 N. W. 865; *Hasbrouck v. Armour & Co.* 139 Wis. 357, 121 N. W. 157; *Brinilson v. C. & N. W. R. Co.* 144 Wis. 614, 129 N. W. 664; *Haley v. Swift & Co.* 152 Wis. 570, 140 N. W. 293; *Lewandowski v. McClintic-Marshall C. Co.* 155 Wis. 322, 143 N. W. 1063; *Felton v. Aubrey,* 74 Fed. 350; *Ellsworth v. Metheney,* 104 Fed. 119; *Iola P. C. Co. v. Moore,* 65 Kan. 762, 70 Pac. 864; *St. Louis & S. W. R. Co. v. Balthrop* (Tex.) 167 S. W. 246; *Schubert v. J. R. Clark Co.* 49 Minn. 331, 51 N. W. 1103; *Lauritsen v. American B. Co.* 87 Minn. 518, 92 N. W. 475; *Morrison v. Carpenter,* 179 Mich. 207, 146 N. W. 106; *Driscoll v. Newark & R. L. & C. Co.* 37 N. Y. 637, 97 Am. Dec. 761.

The following opinion was filed May 4, 1915:

KERWIN, J. At the time of the injury complained of the defendant was the owner of a coal dock on the bay in the city of Superior and engaged in unloading coal from boats onto said dock. In carrying on the business boats loaded with coal are tied up at the end of said dock. The floor of the dock is a few feet above the water of the bay. A trestle rests on the dock six or eight feet from the end of the dock and extends above the floor of the dock about sixty feet. There are appliances used for hoisting buckets of coal from boats tied up beside the dock, and a chute or hopper into which is dumped the coal raised from the boats in said buckets. On top of the trestle is a shanty which is occupied by the person who operates the machinery. The buckets in passing from the boat to the chute pass over and sixty or seventy feet above the portion of the floor or dock which is at the bottom of the superstructure and between it and the outer or channel edge of the dock. In the usual operation of unloading coal from the boats onto the dock lumps of coal fall from the buckets onto the dock and near the outer edge of the dock.

On the 4th and 5th of December, 1912, the steamer Charles Hebbard was moored at the edge of the dock of defendant for

the purpose of having its cargo of coal unloaded on defendant's dock and the defendant was on said days engaged in unloading the cargo. On and prior to December 5, 1912, one George Taylor was in the employ of the Superior Shipbuilding Company as mechanic and ship carpenter. Said Shipbuilding Company was at said time engaged in repairing boats when moored at the docks. Said Shipbuilding Company received an order to repair the Charles Hebbard, and in pursuance of such order directed Taylor and others of its employees to make the repairs. On the 5th of December, 1912, said Taylor was engaged in making the repairs, when a lump of coal fell from a bucket while being hoisted by defendant and struck him upon the head, from the effects of which he died.

Counsel for defendant insists that the plaintiff failed to make a case and that a verdict should have been directed for defendant on the ground that there was no proof of negligence on the part of defendant and that the evidence showed that the deceased was guilty of contributory negligence.

1. It is contended by counsel for appellant that deceased was a trespasser, or at most a bare licensee to whom the defendant owed no duty of active care. It is clear from the evidence that deceased was not a trespasser. He was lawfully at work repairing the boat at the time of the injury. He was authorized to be there and the defendant knew that he was at work repairing the boat and made no objection, so deceased at the time of injury was entitled, at least, to all the privileges and protection of a licensee. This court has often spoken upon the subject. *Davis v. C. & N. W. R. Co.* 58 Wis. 646, 17 N. W. 406; *Dowd v. C., M. & St. P. R. Co.* 84 Wis. 105, 54 N. W. 24; *Hupfer v. Nat. D. Co.* 114 Wis. 279, 90 N. W. 191; *Muench v. Heinemann,* 119 Wis. 441, 96 N. W. 800; *Rowley v. C., M. & St. P. R. Co.* 135 Wis. 208, 115 N. W. 865; *Hasbrouck v. Armour & Co.* 139 Wis. 357, 121 N. W. 157; *Brinilson v. C. & N. W. R. Co.* 144 Wis. 614,

129 N. W. 664; *Haley v. Swift & Co.* 152 Wis. 570, 140 N. W. 293; *Lewandowski v. McClintic-Marshall C. Co.* 155 Wis. 322, 143 N. W. 1063.

The defendant was lawfully engaged in unloading the cargo. The deceased was lawfully on the boat repairing it. Under the decisions of this court the defendant was bound to refrain from acts of affirmative negligence. It was bound to so act as not to unnecessarily increase the danger to deceased or render the premises more dangerous, at least without notifying deceased of such increased danger. The rule is that one cannot be actively negligent toward a mere licensee. *Hupfer v. Nat. D. Co.* 114 Wis. 279 (90 N. W. 191), at p. 290.

The licensor owes to the licensee the duty to refrain from acts of active negligence rendering the premises dangerous. *Brinilson v. C. & N. W. R. Co.* 144 Wis. 614, 129 N. W. 664.

The evidence shows that deceased had repairs to make on both sides of the boat. He had worked some on the port side and had started to do work on the starboard side under the unloading rig while the defendant was making some repairs on the unloading rig, which took over an hour to make, during which time the unloading rig was not running and it was safe for deceased and his crew to do the work. There is credible evidence that the defendant knew that deceased and his crew were at work on the starboard side of the boat and under the unloading rig where the coal dropped when the unloading rig was in operation and that deceased was not notified when the rig was started immediately before the coal fell upon him. The jury found that deceased was not warned and we think the findings are supported by the evidence.

We think the evidence was sufficient to show negligence on the part of defendant. Deceased and his crew were repairing the boat under the hoisting rig while the hoisting crew was repairing the steering line. Deceased was entitled to be

warned before the rig was again started, and the jury found upon sufficient evidence that he was not and that such failure to warn was the proximate cause of the injury.

It is further contended that the evidence establishes that deceased was guilty of contributory negligence. The jury acquitted him of contributory negligence, and we think there is ample evidence to support the finding. Had it been established that deceased continued to work at the place where injured after being warned and knew the danger, the situation would be different. There is evidence that only a few buckets had been hoisted after the steering line had been repaired, and that about two buckets a minute were hoisted; that after the steering line had been repaired the rig started, and after three or four buckets had been hoisted the rig was again stopped to allow the "bleeders" to be fixed, and deceased was injured by coal falling from the first bucket that was hoisted after the "bleeders" were fixed and the rig started.

We are convinced that there was no error in refusing to direct a verdict for defendant.

2. Counsel assigns thirty errors. We shall not attempt to discuss them at length. Perhaps they might be disposed of properly by the statement that we find no prejudicial error in the record. *Northern L. Co. v. Wis. L. S. Asso.* 160 Wis. 203, 151 N. W. 256.

The first assignment of error is the refusal to direct a verdict, which has been already disposed of.

The second and third assignments are to the effect that the court erred in refusing to submit to the jury whether Anderson [the hoister] exercised ordinary care or the precaution usually exercised upon the dock. There was no error in refusing these requests. They asked for a finding evidentiary and did not cover any fact put in issue by the pleadings, and moreover the matter involved was sufficiently covered by the verdict submitted and the charge.

The fourth assignment of error is the refusal of the court

to submit the question whether the deceased, Taylor, knew the rig had started and coal was being hoisted before the hoisting of the particular bucket from which coal fell which caused his injury. There was no error in refusing to submit this question for the reasons stated under the second and third assignments. *Steber v. C. & N. W. R. Co.* 139 Wis. 10, 120 N. W. 502; *Wawrzyniakowski v. Hoffman & B. M. Co.* 146 Wis. 153, 131 N. W. 429; *Anderson v. Sparks,* 142 Wis. 398, 125 N. W. 925; *Lomoe v. Superior W., L. & P. Co.* 147 Wis. 5, 132 N. W. 623; *Vogel v. Herzfeld-Phillipson Co.* 148 Wis. 573, 134 N. W. 141.

The fifth, sixth, seventh, eighth, ninth, tenth, eleventh, and twelfth assignments may be considered together and relate to the refusal of the court to instruct the jury as requested by counsel for defendant. These requests were to the effect (a) that defendant was under no obligation to warn deceased; (b) that deceased was a man of experience and presumed to know the dangers; (c) that defendant was in no way interested in deceased being upon the dock and under no obligation to take active measures for his safety; (d) that deceased was bound to look after his own safety; (e) that there is no evidence that defendant's employees knew deceased's hearing was not acute; (f) that if deceased was hard of hearing it was his duty to govern himself accordingly; (g) that positive testimony is ordinarily entitled to more weight than negative. There was no error in the refusal to give these requests—at least no prejudicial error. So far as the requests touching deceased's familiarity with the business is concerned the matter was sufficiently covered by the charge given. On the requests as to dullness of hearing it does not appear that dullness of hearing had anything to do with the injury, because others present who were not dull of hearing and who were in position to hear did not hear the alleged warnings. Moreover the question was covered by the charge given. The request under (g) was sufficiently

covered by the general charge, which was substantially correct. *Van Salvellergh v. Green Bay T. Co.* 132 Wis. 166, 111 N. W. 1120; *Coel v. Green Bay T. Co.* 147 Wis. 229, 133 N. W. 23; *Brown v. Milwaukee E. R. & L. Co.* 148 Wis. 98, 133 N. W. 589; *Marinette v. Goodrich T. Co.* 153 Wis. 92, 100, 140 N. W. 1094.

Assignments 12 and 13 refer to instructions of the court which it is claimed put the burden of proof upon the defendant as to questions 1 and 2 of the special verdict. The charge does not specifically put the burden of proof upon the defendant. It does not state upon whom the burden rests, but even if it did there was no reversible error, since questions 1 and 2 might be eliminated from the verdict and the balance of the verdict would support the judgment. In fact it is practically conceded on both sides that questions 1 and 2 are immaterial. They may therefore be regarded as surplusage. *Milwaukee T. Co. v. Milwaukee,* 151 Wis. 224, 138 N. W. 707.

Error is assigned because the court instructed the jury in effect that if the employees of the defendant knew deceased was in a place of danger, or ought to have so known, it was their duty to give warning. There was no prejudicial error in this part of the charge. *Rowley v. C., M. & St. P. R. Co.* 135 Wis. 208, 115 N. W. 865; *Hogan v. C., M. & St. P. R. Co.* 59 Wis. 139, 17 N. W. 632.

Other errors assigned we do not regard of sufficient importance to require treatment. We have carefully examined the record and all the errors assigned and are convinced that no prejudicial error was committed.

By the Court.—Judgment is affirmed.

A motion for a rehearing was denied, with $25 costs, on October 5, 1915.

TODD, Appellant, vs. LOOMIS and others, Respondents.

April 15—October 5, 1915.

Judgment by default: Restraining enforcement: Fraud: Laches.

In an action to restrain enforcement of a judgment by default on the ground that it was inequitable and obtained by fraud, the evidence is *held* to sustain the findings of the trial court that there was no fraud or unfair conduct in securing the judgment, and that plaintiff, having slept upon his rights for more than two years, was not entitled to equitable relief.

APPEAL from a judgment of the circuit court for Washburn county: W. B. QUINLAN, Judge. *Affirmed.*

Action to enjoin enforcement of a judgment upon the ground of its being inequitable and having been obtained by fraud.

The judgment referred to was rendered by default November 21, 1911, in the circuit court for Washburn county, in favor of *C. A. L. Loomis* and against plaintiff for $564.22, on two promissory notes of $250 each. Plaintiff in this action claimed that the two notes were given with a contract for the purchase of a stallion, and were, when parted with, attached to such contract and governed by its provisions; that they did not have any red-ink memorandum written thereon; that they were given in payment for a stallion; and that, later, and without his knowledge or consent, such memorandum was so written. It was stipulated in the contract that the purchase price of the notes should be paid out of earnings of the stallion, should not be enforced until such earnings amounted to $500, and, in case of precedent death of the stallion from some unavoidable cause, the earnings up to that time should be received in settlement of the debt. Fifty dollars were earned by the stallion the first year and paid over. The animal died the next year, having earned $50, which was collected and paid over, and $40 in advance payments which it was mutually agreed plaintiff might keep

for expenses. By reason of the facts plaintiff refused to pay anything further on the notes and in November, 1911, thereafter suit was commenced thereon. Plaintiff is an ignorant man and did not appreciate the effect of the service made on him. He was informed by the attorney that no judgment would be taken against him on the notes because the required red-ink memoranda were not thereon. He relied thereon. He supposed he had to appear at the attorney's office in twenty days but did not do so because he was sick. Application was made to the clerk of the circuit court for judgment. The notes did not disclose their true character, because detached from the contract, otherwise judgment could not have been obtained. They then contained the required red-ink memoranda. Plaintiff did not discover the fraud that had been perpetrated on him till about March, 1914. Before this action was commenced the judgment was assigned to *Chrissie T. Loomis,* wife of defendant *C. A. L. Loomis.* The judgment is inequitable and a cloud on the title to plaintiff's realty.

The claim of defendants was this: The notes, when delivered, were in the same condition as when put in judgment. The stallion was sold to be used for breeding purposes and with the understanding alleged. The stallion was not used for breeding purposes to any considerable extent and so far as so used the earnings were not accounted for. The maker of the notes understood fully the proceedings to obtain judgment but paid no attention thereto.

There was evidence on behalf of plaintiff tending to prove the facts alleged by him and evidence on behalf of defendants tending to prove the facts as claimed by them, particularly this: Efforts were made to obtain a settlement with the debtor on several occasions after the horse died. The action on the notes was not commenced until over a year thereafter. The debtor knew that commencement of the action meant a judg-

ment against him if he paid no attention to the matter. He was not misled by the plaintiff in such action, or his attorney. He neglected the matter, thinking he was execution proof, until some two years and a half after judgment. He then discovered that if the notes did not, originally, have the red-ink memoranda thereon required by law, they were unenforceable, and then proceeded to avoid judgment on that ground.

The trial court found, among other things, this: A proper red-ink memorandum was written on each of the notes when they were executed. The judgment on the notes was regularly entered upon due and proper service, November 21, 1911. The action to impeach such judgment was not commenced until April 14, 1914. The judgment was not entered for some two months after service of the summons. The action was not commenced until after reasonable, but fruitless efforts were made to secure an accounting and settlement under the purchase contract. After the entry of the judgment, efforts were made to have the debtor pay it, but he refused to do so, or pay any attention thereto, believing that it was uncollectible. When he came to appreciate that his property could be reached to satisfy it he commenced this action. He is a man of average intelligence and reasonably well acquainted with court proceedings. He so slept upon his rights as to be guilty of fatal laches.

Upon such facts, judgment of dismissal with costs was ordered and rendered.

A. L. Bugbee, for the appellant.

For the respondents there was a brief by *L. H. Mead* and *D. L. Grannis,* and oral argument by *Mr. Grannis.*

The following opinion was filed May 4, 1915:

MARSHALL, J. Notwithstanding counsel for appellant discussed at considerable length in his brief and oral argument several legal propositions, the cause below turned on

the facts. There was no controversy there and there is none here respecting any principle of law.

It follows that the real purpose of this appeal is to impeach the findings of the trial court respecting the appellant's allegations of matters of fact. On that we are unable to see our way clear to disturb the decision below. The findings are all against appellant's claims of fraud and unfair conduct and on sufficient evidence to preclude disturbing them. The findings also amply warranted the conclusion that appellant had too long slept upon his claim for redress to be entitled to the favor of equity.

By the Court.—The judgment is affirmed.

A motion for a rehearing was denied, with $25 costs, on October 5, 1915.

Leach and another, Respondents, vs. Koch and another, Appellants.

April 16—October 5, 1915.

Sales: Article made to order: Variance from contract: Substantial performance.

Plaintiffs were not entitled to recover for the making of a silo form for defendants, the jury having found that the form was not constructed according to the agreement of the parties, and there being evidence that it varied substantially from such agreement.

Appeal from a judgment of the circuit court for Washington county: Martin L. Lueck, Circuit Judge. *Modified and affirmed.*

J. C. Russell, for the appellants.

For the respondents the cause was submitted on the brief

of *J. H. Schnorenberg,* attorney, and *E. W. Sawyer,* of counsel, and a separate brief by *Mr. Sawyer.*

The following opinion was filed May 4, 1915:

KERWIN, J. This action was brought to recover for a silo form at an agreed price of $175, alleged to have been sold and delivered by the plaintiffs to the defendants.

The answer, among other things, alleges that the plaintiffs and defendants entered into an agreement whereby the plaintiffs agreed to make for the defendants two silo forms to be used in defendants' building and erecting concrete silos, one of said forms to be used for the building of twelve-foot diameter silos and the other to be used in building fourteen-foot diameter silos; that said forms were to be ready for delivery April 17, 1913. There are other allegations in the answer to the effect that the forms were never completed or delivered and that the plaintiffs informed the defendants that they could make but one, the fourteen-foot diameter silo form, and that defendants refused to accept the fourteen-foot form. The defendants deny generally the material allegations of the complaint and also set up a counterclaim to the effect that they were greatly damaged by the failure of plaintiffs to make the forms as agreed. The jury returned the following verdict:

"(1) Were the plaintiffs, by the agreement of the parties, bound to furnish defendants both a fourteen-foot and a twelve-foot silo form? *A.* No.

"(2) At the time when the defendants refused to accept the fourteen-foot silo form, was said fourteen-foot silo form completed so as to comply with the agreement of the parties? *A.* No."

Both parties moved for judgment on the verdict. The court below in deciding the case said that he was of opinion that on the special verdict, when construed in the light of

what transpired on the trial, the plaintiffs were entitled to have the sum of $175 allowed for the fourteen-foot silo form and ordered judgment accordingly, which was entered, from which this appeal was taken.

It is not clear upon what grounds the court ordered judgment for the plaintiffs. It seems that the defendants objected generally to receiving the one silo form on the ground that plaintiffs refused to furnish two, but there was also evidence in the case to the effect that the fourteen-foot form was not constructed according to the agreement, and the jury in answering the second question so found.

The court below evidently thought that if there was a substantial performance of the contract that was sufficient, and that although the plaintiffs had not constructed the form in accordance with the agreement still they were entitled to recover what it was reasonably worth. We cannot discover any other theory upon which the court below ordered judgment.

The jury found that the contract was for one silo form, but the defendants were entitled to have that form constructed in accordance with the agreement and were not obliged to receive it unless it was so constructed. The jury found upon sufficient evidence that the plaintiffs' contract was not performed and that they did not offer to deliver a silo form in accordance with the agreement. Such finding showed no right of recovery. It is argued by counsel for respondents that there was a substantial compliance. The jury found that the form was not according to contract and there is evidence that it varied substantially from the contract, therefore the defendants were not obliged to accept it. Under such circumstances and upon the record the court below should have ordered judgment for the defendants.

By the Court.—The judgment of the court below is reversed, and the cause remanded with instructions to dismiss the complaint.

The respondents moved for a rehearing, and the following opinion was filed October 5, 1915:

KERWIN, J. On this motion our attention is directed to an error committed by the court in ordering the complaint dismissed. It appears that certain items for goods sold and delivered to the defendants were admitted by the answer to be a proper claim against the defendants, so it seems that the judgment should have gone for the plaintiffs for that amount with costs. The complaint was duly verified and the amount claimed exceeded $200, and, the recovery being more than $50, plaintiffs were entitled to costs. Sub. (7), sec. 2918, Stats.

The whole amount claimed in the complaint was $229.20, with a $5 credit, reducing it to $224.20. Some interest appears to have been allowed which raised the amount of damages to $234.81. This interest, of course, was allowed on the $175 claimed for the silo form as well as on the items admitted to be correct. Apportioning the interest, the amount properly allowed on the $49.90, amount due plaintiffs, would be approximately $2.45, aggregating $52.35, amount for which judgment should have been rendered for plaintiffs, with costs.

By the Court.—The judgment of the court below is modified by inserting in lieu of $234.81 damages the sum of $52.35 damages and $64.49 costs and disbursements, and inserting in lieu of $299.75, amount of judgment and costs as entered, the sum of $116.84, and as so modified the judgment is affirmed as of the date of entry. The appellants are entitled to costs in this court.

VOELZ and another, Appellants, vs. INDUSTRIAL COMMISSION and another, Respondents.

April 16—October 5, 1915.

Workmen's compensation: Award must be supported by findings: Findings not to be based on conjecture: Loss of eye: Infection: Proximate cause.

1. Under sec. 2394—19, Stats., an award of the industrial commission must be supported by its findings of fact, and every finding must have some substantial evidence in its support, though not necessarily the preponderance of the evidence.
2. A finding of fact made by the commission cannot be based on mere conjecture any more than a finding of fact made by the court.
3. While a plumber was attempting to unscrew the locknut of the hot-water cock of a wash bowl in a private residence, some substance fell into his eye, causing him pain, and impelling him to rub the eye frequently. Thereafter a gonorrhœal infection developed in the eye and he lost the sight thereof. He had had no such infection previously, and none developed elsewhere, but it was purely conjectural, and the industrial commission did not find, whether the infection of the eye came from the substance which fell into it, or from rubbing it with an infected cloth, or washing it in infected water, or in some other way. *Held*, that he was not entitled to compensation, it not appearing that the loss of the eye proximately resulted from an injury "incidental to and growing out of the employment."

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

This is an appeal from a judgment affirming an order of the *Industrial Commission* made under the Workmen's Compensation Act, awarding $1,124.40 to the claimant as compensation for the loss of an eye. The appellants claim that there was no sufficient proof that the loss of the eye was the result of an accident while in their employ.

The facts were as follows: The claimant is a plumber. He was working for the appellants, who are master plumbers, April 3, 1914, on which day he was sent with a helper to repair the plumbing in connection with a wash bowl in the resi-

dence of one Fass in Milwaukee. He was repairing the hot water basin cock and in order to do so it was necessary to remove a locknut from the under side of the bowl. To do this he lay down on his back on the floor and attempted to unscrew the nut, and while in this position "something" fell in his eye which caused acute pain and impelled him to rub his eye at once and frequently thereafter in the effort to get it out. He was unable to continue at work, but his helper finished the job under the claimant's direction. On the following day (Saturday) his eye was bloodshot and pained him somewhat, but he kept at work. He did not work on Sunday, but went back to work on Monday, the eye being bloodshot, the lids swelled, and pus beginning to discharge. At noon he quit work and consulted a physician (Dr. Schuster), who treated it for a week with no improvement, but rather the reverse. Then he went to Dr. Higgins, who at once made a microscopical examination of the pus discharged, found it to contain gonococci bacilli, and sent the claimant to a hospital. The difficulty was too far advanced, however, for cure, and the sight of the eye was lost. The claimant was examined superficially by Dr. Higgins to ascertain if he had gonorrhœal infection aside from the infection of the eye, with negative results. He was also examined at about this time by Dr. Connell under the eugenics law and was given a certificate by him that he was free from such infection and might marry. He developed no infection anywhere except in the eye and he testified that he had never had any gonorrhœal disease.

The *Industrial Commission,* in a memorandum attached to the award, made the following findings:

"It is clear from the evidence that the applicant had not suffered, prior to the accident, from a gonorrhœal disease, except as it may be inferred from the fact that thereafter gonococci was discovered in the pus from the eye. This infection of the eye might well have come from outside sources. The particles which he received in the eye might have been in-

fected, or, with the eye inflamed, it might have become infected by rubbing it with an infected cloth or washing it in infected water, or in other ways. This seems a reasonable conclusion.

"The proximate cause of the injury, therefore, must be traced to the original accident whereby he received some injury to the eye by some substance finding lodgment in it."

The trial judge, in affirming the *Commission's* award, said:

"The evidence establishes an injury to the eye in the course of defendant's employment, the development of the germ within the usual time after such injury, and the consequent loss of sight. There is no proof of any other source of infection, and the defendant himself is shown to be free from such infection. Considering this state of the proof in view of the well established rules, the court cannot disturb the findings and award of the *Commission.*"

For the appellants there was a brief by *Henry J. Killilea* and *George Luebke,* and oral argument by *Mr. Killilea.* They cited *Clark v. Franklin F. M. Ins. Co.* 111 Wis. 65, 68, 86 N. W. 549; *Chybowski v. Bucyrus Co.* 127 Wis. 332, 340, 106 N. W. 833; *Schell v. C. & N. W. R. Co.* 134 Wis. 142, 146, 113 N. W. 657; *McCoy v. Michigan S. Co.* 180 Mich. 454, 147 N. W. 572; *Bryant v. Fissell,* 84 N. J. Law, 72, 86 Atl. 458, 3 N. & C. C. A. 585; Ruegg, Emp. Liab. & Workm. Comp. (8th ed.) 343; Boyd, Workm. Comp. § 559.

For the respondent *Industrial Commission* there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

The following opinion was filed June 1, 1915:

Winslow, C. J. The *Industrial Commission* can make no award unless it be supported by its findings of fact (sec. 2394—19, Stats.), and every finding of fact must have some substantial evidence in its support, though not necessarily the preponderance of the evidence. *Milwaukee C. & G. Co. v. Industrial Comm.* 160 Wis. 247, 151 N. W. 245. It must

result from this that a finding of fact made by the *Commission* cannot be based on mere conjecture any more than a finding of fact made by the court. It does not require so much evidence in its support, but it cannot be upheld without evidence.

In the present case the *Commission* did not determine the crucial question of fact in the case, namely, the question how the gonococci germs got into the eye. They say that the substance which fell in the eye may have been infected, or, "with the eye inflamed, it might have become infected by rubbing it with an infected cloth or washing it in infected water, or in other ways. This seems a reasonable conclusion." We interpret this as meaning that it is purely conjectural as to how the infection got in the eye, hence they do not decide that question, but their legal conclusion is that, however the infection came in, it is legally traceable to the dropping of the foreign substance in the eye, because that fact inflamed the eye and induced the rubbing with an infected cloth or the washing with infected water.

This would be strictly logical if it could be said (1) that the claimant would not have washed his eye or rubbed it with a towel in the absence of the injury to the eye, and (2) that only an inflamed eye could be infected by a gonorrhœal infection. The difficulty is that neither of these propositions can be supported. People who have suffered no such mishaps also wash their faces and wipe their eyes with towels daily as a matter of course, and it is a well known fact that the gonorrhœal infection waits not upon inflammation or injury to make its entry into the eye.

It is said in the Encyclopedia Britannica (11th ed.), vol. 27, p. 983:

"One of the most important points in the management of a case of gonorrhœa is to prevent all risk of the septic discharge coming into contact with the eye. It sometimes happens that the patient inadvertently introduces the germs into his own eye by his finger, or that his eye or the eye of some mem-

ber of his household becomes inoculated by the use of an infected towel. If this happen, prompt and energetic measures must be taken to save the eye."

In the present case it is found, upon sufficient evidence, that the claimant had no gonorrhœal infection except that which developed in his eye, but it does not appear where or under what circumstances he washed the eye or what towels or cloths he used to wipe it.

Apparently the substance which fell in his eye was something hard. No mention is made of it as a liquid. The claimant calls it "something" and says he tried to get it out by rubbing. It appears by the evidence that the claimant was not working on the waste pipe or any pipe which takes water away from the wash bowl, but on the locknut of the basin cock, *i. e.* the cock which supplies clean water to the bowl.

If the *Commission* had found as a fact that the infection came from the substance that dropped in the eye, it might be difficult to say that there is *no* evidence to support the finding, but they did not so find. On the contrary they reached the conclusion, which seems to us eminently reasonable and logical, that it might have come from this source and might also have come from a number of outside sources.

In substance, the conclusions of the *Commission* are as follows: Something fell in the plaintiff's eye, causing pain; he rubbed the eye; gonorrhœal infection followed; he did not have the infection previously; we cannot determine whether the infection in the eye came from the substance which fell into it, from water with which he bathed it, or from a towel with which he rubbed it, but in either event we regard the dropping of the substance in the eye as the legal cause of the subsequent loss of sight within the meaning of the Compensation Act.

If this be correct, then any man at work at any occupation who gets something in his eye while at work and rubs the eye, the rubbing being followed by gonorrhœal infection, may re-

cover for the loss of the eye simply on producing evidence of these facts, together with evidence tending to show that he did not have gonorrhœal infection previously. We cannot agree that this is good law. It bases liability upon conjecture. Unless there be some evidence tending to show that the substance which fell in the eye caused the infection and unless that fact be found, we cannot regard the subsequent loss of the eye as proximately resulting from an injury "incidental to and growing out of the employment." *Hoenig v. Industrial Comm.* 159 Wis. 646, 150 N. W. 996.

By the Court.—Judgment reversed without costs, and cause remitted to the circuit court with directions to set aside the award of the *Industrial Commission.*

SIEBECKER, J., dissents.

A motion for a rehearing was denied, without costs, on October 5, 1915.

DULUTH STREET RAILWAY COMPANY, Appellant, vs. RAILROAD COMMISSION, Respondent.

May 4—October 5, 1915.

Street railways: Regulation of rates: Paramount right of state: Ordinance contracts: Validation by legislature: Statute construed: Railroad commission: Fixing reasonable rates: Valuation of property: Evidence: Findings: Review in circuit court: Trial de novo: *Appeal: Decision, when disturbed: Reasonable return from investment. Discriminating rates: Tickets at reduced rate: Elements of value to be considered: Earning power: Valuation for taxation not conclusive: Going value: Franchise value: Investment in amusement park: Unimportant omissions: Reproduction cost: Engineering cost: Interest and contingencies: Coordination of plant: Original cost: Undervaluations: Easement in streets: Validity of grant: Economies in operation: Method of arriving at values.*

1. A municipal ordinance, enacted under the authority of sec. 1862, Stats., and its acceptance by a street railway company, even if

they constituted a valid contract empowering the company to charge a five-cent fare, did not abrogate the right of the legislature, acting directly or through the railroad commission, to regulate the rates. The contract in such a case remains valid only until the state sees fit to exercise its paramount power of regulation.

2. Sec. 247, ch. 124, Laws 1891, repealing the original charter of the city of Superior (ch. 152, Laws 1889), but providing that nothing in the repealing act "shall be held to impair any of the rights granted by said city" to the street railway company, that the ordinance granting the same is "ratified, confirmed and validated," and that ordinances not repealed were to continue and remain in force "until altered, amended, repealed or suspended by the common council in pursuance of this act," did not make the ordinance granting rights to the street railway company a law of the state, nor constitute a contract between the state and the company fixing the rate of fare to be charged by the company during the term of its franchise. It merely preserved existing rights granted by the city and cured any defect that might exist in the manner of granting the franchise.
3. An inventory of the property of a street railway system, made for the owner at the time such owner purchased the system, together with a subsequent cost appraisal by engineers of the railroad commission,—all constituting one of the files in the office of the commission at the time of the hearing,—although not formally offered in evidence, was properly considered by the commission in valuing the street railway property for the purpose of fixing rates.
4. Even if the railroad commission considered improper evidence in fixing rates to be charged by a street railway company, that fact would not be ground for reversal of the judgment of the circuit court based upon a trial *de novo* under sec. 1797—16, Stats. *International H. Co. v. Industrial Commission*, 157 Wis. 167, distinguished.
5. Under sec. 1797—14, Stats., the railroad commission has no power to change rates unless they are found to be unreasonable or discriminatory; but where the commission found that the rates charged by a street railway company were "somewhat higher than they should be," and proceeded to fix a considerably lower rate, which it held to be reasonable and adequate, this was in substance a finding that the former rate was unreasonable.
6. In ascertaining whether rates of fare charged by a street railway company are reasonable or otherwise, net earning power is one of the most important elements to be considered. Where rates are so adjusted as to yield a fair return on the value of the prop-

erty over and above expenses and depreciation they are reasonable; where they are so fixed as to materially exceed this sum, they are not.

7. A decision of the railroad commission as to what is a reasonable rate, if approved by the trial court, will not be disturbed by this court on appeal unless it is clearly wrong.

8. A decision of the railroad commission in this case that, under all the circumstances, a return of seven and one-half per cent. per annum on the reasonable value of the street railway property in the city of Superior would be fair and adequate, and that the rates of fare should be adjusted accordingly, is sustained.

9. An order of the railroad commission requiring a street railway company to sell six tickets for twenty-five cents is not void on the ground that it unjustly discriminates against those who wish to purchase only a single ride.

10. A valuation of street railway property for taxation purposes (which may be larger because an excessive amount is being earned) is not conclusive as to its value for rate-making purposes; but it may well be that after the state has fixed a value for the latter purpose and restricted the earning power of the road to a reasonable return on such value, it should not fix a materially higher value for purposes of taxation.

11. When the value of the property of a street railway company, operating under an indeterminate permit and entitled to charge only reasonable rates, is fixed on the theory that the business is a going one and that the owner will be permitted to carry it on in the future unless the municipality elects to buy it for full and fair value, all proper allowance is thereby made for franchise value.

[12. Whether, in valuing for rate-making purposes the property of a street railway in Superior operated by the same company that operated the street railway in Duluth, a *pro rata* share of the company's investment in an amusement park in Duluth should have been taken into account, is not determined.]

13. Failure to take into account items aggregating only $4,476 was not a substantial error affecting a decision by which, for rate-making purposes, the property of a street railway company was valued at $700,000.

14. An allowance by the railroad commission, in valuing street railway property for rate-making purposes, of only twelve per cent. of the reproduction cost, to cover cost of engineering, interest on money during construction, mistakes, and unforeseen contingencies, having support in the evidence and having been approved by the trial court, is sustained on appeal.

15. Where the railroad commission determined what it would cost to

reproduce a street railway plant in the condition it was at the time of the hearing, this necessarily included the cost and value of co-ordinating the plant into a harmonious entity.

16. Where, in a proceeding to fix the rates of fare to be charged by a street railway company, an attempt was made to ascertain the original cost of the property and also what it was worth after making deductions for depreciation, certain alleged omissions and undervaluations were unimportant, it appearing that they had no substantial effect on the final determination by the railroad commission, which was more largely based upon the reproduction cost less depreciation, with an allowance for going value, and there being no claim that in ascertaining such reproduction cost any items of property were omitted.

17. Although, before the recording of a city plat, an easement and right of way for street railway purposes in streets designated thereon was conveyed by the owner of the land to a street railway company, such company could not lay its tracks or operate its cars except in pursuance of a franchise granted by the city; and the railroad commission properly allowed nothing on account of such easement in valuing the property of the company for rate-making purposes, in the absence of any evidence as to what the value of such easement would be in case the company should in the future be authorized to carry freight or to run interurban cars and abutting owners should claim damages on the ground that an additional servitude was thereby imposed upon their property.

18. Such grant of an easement in the streets having presumably been made to insure to the grantee the exclusive right to build a street railway in the city, its validity may well be doubted.

19. The failure to take into account, in fixing the rates of fare to be charged for street railway service in Superior, alleged economies in operation by reason of the street railway lines in Superior and Duluth being under one management and control and supplied with power from a single plant, is *held* to have been justified by the evidence, which tended to show that the amount so saved was so small as to be negligible.

20. In fixing a value for rate-making purposes the railroad commission correctly considered the cost of reproduction, the fact that the street railway company was a going concern having an established business, the fact that it would have the right to continue to carry on the business in the future, and, to some slight extent, the original cost of the property less depreciation, treated them as inseparable parts of one harmonious entity, and fixed a value on the property as an entirety, giving due importance to reproduction cost. No erroneous elements were included in fixing a value as indicated and no essential elements were excluded.

MARSHALL, J., dissents.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

The Commercial Club of the city of Superior filed a complaint with the *Railroad Commission of Wisconsin,* setting forth that the rate of fare charged by the *Duluth Street Railway Company* for carrying passengers on its street cars in the city of Superior was excessive, and praying that an investigation be made and the rate of charge reduced. Issue was joined on this petition and a hearing had before the *Railroad Commission* on January 16, 1912, and continued from time to time until completed. At the time the petition was filed a charge of five cents was made for carrying each person, except children under five years of age, the payment of which sum entitled a person to one continuous ride with the privilege of a universal transfer. After the hearing was had, the *Railroad Commission,* on November 13, 1912, ordered the plaintiff in this action to sell, through its conductors, six tickets for twenty-five cents, good on all lines at all hours, and subject to existing transfer privileges. The plaintiff brought an action in the circuit court for Dane county to set aside this order. The circuit court found the value of the plaintiff's property used and useful in conducting its business as a common carrier was reasonably worth the sum of $700,000 on June 30, 1911, and that the order of the *Railroad Commission* requiring the sale of six tickets for twenty-five cents was neither unlawful nor unreasonable. As a conclusion of law the court found that the defendant was entitled to judgment dismissing the complaint, and from a judgment accordingly entered this appeal is taken.

The facts necessary to an understanding of the issues raised on the appeal are numerous, and those deemed essential will be stated in the opinion in connection with the discussion of the different issues presented.

For the appellant there was a brief by *W. R. Foley* and *Miller, Mack & Fairchild,* and oral argument by *Mr. E. S. Mack* and *Mr. Foley.*

For the respondent there was a brief by the *Attorney General* and *Louis Hanitch,* and oral argument by *Mr. Hanitch* and *Mr. Walter Drew,* deputy attorney general.

The following opinion was filed June 1, 1915:

Barnes, J. The original street railway line in what is now the city of Superior was constructed by the Douglas County Street Railway Company, operating under a franchise granted by the town of Superior before the city was incorporated. Among other things, this franchise authorized the street railway company to charge a five-cent fare between certain designated points, and a ten-cent fare between the Superior and West Superior termini of its road.

In 1889 the city of Superior was incorporated by special act of the legislature. On July 9, 1889, the city granted a franchise to the street railway company to run for a term of thirty years. Sec. 7 of such franchise was as follows:

"The said company may regulate and establish, from time to time, such rates of fare for the transportation of passengers or freight over its lines of railway, as it may deem proper; provided that the charge for carrying a person, including hand baggage, from one point to another, within the city limits, shall not exceed five (5) cents for a distance of two miles or less, nor five (5) cents over any continuous line operated as such."

Sec. 17 of the ordinance provided that within thirty days after its publication the street railway company might file its acceptance thereof with the city clerk and the relinquishment of all rights and privileges acquired under the franchise granted by the town of Superior, and that from and after the filing of such acceptance the ordinance should have the effect of and be a contract between the city of Superior and the street railway company, which should be the measure of the rights and liabilities of said city as well as of said company. This ordinance was accepted by the street railway company.

Ch. 124 of the Laws of 1891 was entitled "An act to re-

vise, consolidate and amend chapter 152 of the Laws of 1889, entitled 'An act to incorporate the city of Superior.'" As a matter of fact, sec. 247 of ch. 124 of the Laws of 1891 repealed ch. 152, Laws of 1889. This section provided that the repeal should

"not in any manner affect, injure or invalidate any existing contract, act or suit, claims, penalties or demands, that may have been entered into, performed or commenced by the village of Superior (and the word 'village' herein shall be construed to mean city), or that may exist under or by virtue or in pursuance of the said act incorporating said city, or of the acts and parts of acts amendatory thereof, or of any of them, but the same shall exist and be enforced and carried out and be completed as fully and effectually to all intents and purposes as if this act had not been passed, and nothing herein contained shall be held to impair any of the rights granted by said city of Superior to the Douglas County Street Railway Company, and the ordinance granting the same is hereby ratified, confirmed and validated, and all other ordinances, resolutions, regulations, rules, by-laws and orders either of the village of Superior or the city of Superior, or parts thereof not repealed, suspended, nor made void by this act, or by ch. 152 of the Laws of 1889, shall continue and remain of the same force and effect as if this act had not been passed, until altered, amended, repealed or suspended by the common council in pursuance of this act."

In 1892 the Douglas County Street Railway Company transferred its property, including its franchises, to the Superior Rapid Transit Company. The latter company went into the hands of receivers in 1896, and the receivers operated the property until 1900, when it was sold on foreclosure and acquired by the *Duluth Street Railway Company,* the present plaintiff. This latter company had been engaged in operating a street railway system in Duluth, and it was placed in the hands of a receiver in 1898. The purchase at the foreclosure sale of 1900 was part of a reorganization affecting both properties, and in fact brought them under a single ownership.

The order made by the *Railroad Commission,* among other things, required that "the *Duluth Street Railway Company,* in addition to its present rates of fare, shall sell, through its conductors, six tickets for twenty-five cents, such tickets to be good for use at all hours of operation over any line, and subject to the existing transfer privileges."

The *Railroad Commission* placed a valuation of $700,000 on the property of the plaintiff in Wisconsin and some property in Duluth used in connection with the operation of the street-car system in Wisconsin.

The plaintiff makes four main contentions: First, that the action of the *Railroad Commission* is void because its order violates the obligation of a contract, contrary to the state and federal constitutions. Second, that its order is void because the *Commission* took a mistaken view of the law, and of its powers, in a number of important particulars. Third, that in any event the rates charged were reasonable, and the *Commission* had no power or jurisdiction to change such rates. Fourth, that the *Railroad Commission* made a gross undervaluation of its property.

Very many questions are argued in the able and exhaustive brief filed by the appellant, but they all bear either directly or indirectly on the propositions above set forth.

Sec. 10 of art. I of the constitution of the United States, and sec. 12 of art. I of the constitution of the state of Wisconsin, each prohibits the passage of any law by the state impairing the obligation of contracts.

Rights conferred by the ordinance of 1889.

The ordinance of 1889 recites that it is to constitute a contract if accepted. The street railway company, in consideration of the privileges granted, relinquished certain rights which it had under its existing franchise. The ordinance and its acceptance constituted a contract protected by both constitutions, provided the city had power to make such a contract, unless the ordinance was subject to amendment or

repeal under the reserve power contained in sec. 1 of art. XI of our constitution.

Counsel for respondent contend that the ordinance provided for a maximum rate which could not be exceeded, and was not a contract empowering plaintiff to exact a five-cent fare at discretion. The parties agreed that the plaintiff might establish such rates of fare "as it may deem proper," provided that the charge for carrying a person from one point to another within the city limits "shall not exceed five cents," etc.

The language used in this franchise is somewhat different from that considered in *Milwaukee E. R. & L. Co. v. Railroad Comm.* 153 Wis. 592, 142 N. W. 491. There a maximum charge was fixed, but it was not affirmatively stated that the railway company might at discretion charge up to the maximum. Whether this case is ruled by the cases of *Detroit v. Detroit City St. R. Co.* 184 U. S. 368, 22 Sup. Ct. 410; *Cleveland v. Cleveland City R. Co.* 194 U. S. 517, 535, 536, 24 Sup. Ct. 756, and *Minneapolis v. Minneapolis St. R. Co.* 215 U. S. 417, 30 Sup. Ct. 118, as contended by the plaintiff, or by *Georgia R. & B. Co. v. Smith,* 128 U. S. 174, 9 Sup. Ct. 47; *Southern Pac. Co. v. Campbell,* 230 U. S. 537, 33 Sup. Ct. 1027, and the *Milwaukee Case,* above referred to, as contended by defendant, we do not find it necessary to decide.

Conceding that the ordinance and its acceptance constituted a contract empowering the appellant to exact a five-cent fare, and conceding that the act of the city in making such a contract was not *ultra vires,* still the general provisions of sec. 1862, under which the city acted, did not abrogate the right of the legislature, acting directly or through the *Railroad Commission,* to exercise the function of regulating rates whenever it was deemed proper to assert it. The contract remained valid until the state saw fit to exercise its paramount authority to regulate such rates. So much has

been decided in *Manitowoc v. Manitowoc & N. T. Co.* 145 Wis. 13, 28, 129 N. W. 925, and in *Milwaukee E. R. & L. Co. v. Railroad Comm.* 153 Wis. 592, 142 N. W. 491. Counsel cite many authorities to show that these cases were incorrectly decided. Maybe they were. A writ of error to the federal supreme court has been taken from the judgment in the *Milwaukee Case,* but that court has not yet announced its decision in the case. We are not satisfied that the two cases referred to were incorrectly decided by this court, and for the present and until we are better enlightened we adhere to them and rest our present conclusion on the reasons stated in the opinions in these cases.

Effect of the law of 1891.

Appellant insists, however, that there is one very significant distinction between the present case and the two last referred to, arising out of the enactment of ch. 124, Laws 1891, the material part of which has been quoted. It is argued that here the state has ratified and made the ordinance of 1889 a law of the state, and that while it might set at naught contracts fixing rates made by minor political units acting under sec. 1862, it cannot set aside such a contract of its own making.

If the act of 1891 means what counsel think it does, there is plenty of authority to support the conclusion deduced, unless the act is repealable under the reserve power contained in sec. 1 of art. XI of our constitution. *Walla Walla v. Walla Walla W. Co.* 172 U. S. 1, 19 Sup. Ct. 77; *City R. Co. v. Citizens' St. R. Co.* 166 U. S. 557, 563, 564, 567, 568, 17 Sup. Ct. 653; *Detroit v. Detroit City St. R. Co.* 184 U. S. 368, 382, 383, 389, 396, 398, 22 Sup. Ct. 410; *Cleveland v. Cleveland City R. Co.* 194 U. S. 517, 533, 536, 24 Sup. Ct. 756; *Cleveland v. Cleveland E. R. Co.* 201 U. S. 529, 541, 26 Sup. Ct. 513; *Wright v. Milwaukee E. R. & L. Co.* 95 Wis. 29, 69 N. W. 791.

We think, however, that it was not the intention of the act of 1891 to more than preserve existing rights that might otherwise be jeopardized by the repeal of the charter of the city of Superior and to cure any defect that might exist in the manner of granting its franchise to the plaintiff, and that it was not intended to confer any right on plaintiff which the council itself might not have conferred had it proceeded in the manner provided by law. The city acted under sec. 1862 in enacting the 1889 ordinance. It was in all probability foreign to the legislative thought to single out one street railway company and confer privileges upon it that no other railway company in the state could enjoy under the general law, assuming that sub. 7 of sec. 31 of art. IV of the constitution did not prohibit such action. The language used is not fairly susceptible of the meaning which counsel give it. It was provided that nothing in the repealing act "shall be held to impair *any of the rights granted by said city of Superior*" to the railway company, and the ordinance granting the same is "ratified, confirmed and validated." It seems pretty clear that the ordinance was ratified, confirmed, and validated so as to preserve the *rights granted by the city* and that the validating act went no further. The right now claimed was never granted by the city, for the very good reason that it never had the power to grant it. There is another persuasive reason for adopting this construction of the 1891 law, and that is found in the final provision contained in sec. 247, whereby the ordinance of 1889 and other ordinances not repealed were to continue and were to remain in force "until altered, amended, repealed or suspended by the common council in pursuance of this act." It is not to be supposed that the legislature intended to confer on the city of Superior the power to alter, amend, repeal, or suspend a law enacted by the legislature. It would be a rather startling proposition to assert that the legislature even had the right to delegate to the common council of a city the power to amend

or repeal laws passed by it. We are satisfied that the act of 1891 went no farther than to legalize acts which the city might have done had it proceeded according to law, and that there is no substantial difference between the present case and the former cases concerning the right of the state to regulate the rate of fare which the plaintiff might charge.

Taking up the further questions involved, in the order in which they have been presented, it is urged (1) that the order is void because the *Commission* considered matters which were not in evidence and which the plaintiff had no opportunity to meet; (2) that no reduction could be made in the existing rate unless it was found to be unreasonable, and no such finding was made; (3) that on the basis of the *Commission's* valuation of plaintiff's property, neither the rate nor the return therefrom was unreasonably high; and (4) the property of the plaintiff was grossly undervalued.

Consideration of improper evidence by the Commission.

In endeavoring to arrive at the original cost of the property of the plaintiff the engineers employed by the *Commission* started with an inventory of the property made by Ford, Bacon & Davis in 1900 for the people who were figuring on consolidating the Duluth and Superior street railway lines and buying the property in at the foreclosure sale. The parties making this appraisal were engineers.

The cost appraisal made by the engineers of the *Railroad Commission* was considered by it in ascertaining the cost of the property. The appraisal was not formally offered in evidence, was not exhibited to the plaintiff, and the parties who made it were not sworn as witnesses on the hearing before the *Commission.* No testimony was offered to show that the inventory made by Ford, Bacon & Davis was correct.

The appellant insists that the *Commission* had no right to consider the appraisal made by its engineers, particularly inasmuch as the same was based on an inventory made by other parties and there was no evidence to establish the correctness

of the inventory. Furthermore, that it was entitled to be heard before the *Commission* in reference to the correctness of the appraisal.

The inventory used by the engineers of the *Commission* was obtained from the plaintiff. As we understand the record, this inventory, with the appraisal made by the engineers of the *Commission,* was one of the files of its office when the hearing was had, and might, we think, properly be considered by the *Commission* under the decision in *Chicago & N. W. R. Co. v. Railroad Comm.* 156 Wis. 47, 145 N. W. 216, 974. Of course common fairness would dictate that the plaintiff be advised of the appraisal made by the employees of the *Commission,* if the *Commission* intended to use such figures as a basis for decision. We do not understand it to be claimed that there was any intentional suppression by the *Commission* of evidentiary matters of this kind.

Should it be conceded in this case that the *Commission* did consider improper evidence, we do not see what particular significance would result from the concession. The plaintiff brought its action to set aside the award of the *Commission,* and under the statute was entitled to a trial *de novo* in the circuit court. It was not confined to the evidence used before the *Commission,* and in fact offered considerable additional testimony in the court action. The decision, to be sure, threw the onus upon the plaintiff, but still the proceeding in circuit court was nothing more nor less than an original hearing. If new evidence was offered by the plaintiff on such hearing, which was found to be different from that offered before the *Commission,* the court was required to transmit a copy of the evidence to the *Commission* and stay further proceedings for fifteen days from the date of such transmission, unless the parties stipulated in writing to the contrary. Sec. 1797*m*—67, Stats.

The plaintiff attacked this appraisal in the circuit court. Because of the new evidence which it offered it had the right

to insist that the evidence go back to the *Commission* for reconsideration and for new findings. This right apparently was not insisted upon. The judgment appealed from rests on findings of fact and conclusions of law made by the circuit court. The evidence complained of related to the value of the plaintiff's property. The court has found on the evidence before it that the value fixed by the *Railroad Commission* was the correct value. It is not apparent how a mistake made by the *Railroad Commission* in considering the alleged improper evidence complained of could furnish any ground for a reversal of the judgment of the circuit court based on the evidence taken in that court, there being no complaint that improper evidence was admitted on the trial before the court.

The *International Harvester Co. Case,* 157 Wis. 167, 173, 147 N. W. 53, has no bearing whatever on the question here involved. The plaintiff in the present action was entitled to and had a trial *de novo* in the circuit court. The plaintiff in the other case was not entitled to such a trial, and of course did not have it. Under the statute there involved, the findings of the commission on the facts were conclusive if there was any evidence to support them, because its judgment could be set aside for jurisdictional defects only. If the industrial commission could return the evidence taken which showed no liability whatever, and at the same time state that, as a result of investigations made by it, it was satisfied that there was liability, and in this way sustain the award made, there would be no object in providing for an appeal to the courts, because no award could ever be set aside. Furthermore, it appears that little reliance was placed on this inventory in arriving at a conclusion.

Some complaint is made in reference to information gathered regarding probable use of tickets, which was not submitted to the plaintiff. In reference to this, the testimony showed that the information in question was used in the decision for illustrative purposes only and did not affect the conclusion reached in the case.

Fixing reasonableness of return instead of reasonableness of rate.

The further contention is made by the appellant that the *Railroad Commission* erroneously attempted to regulate the reasonableness of the plaintiff's return and not the reasonableness of the rate of charge, and that under the Public Utilities Law (sec. 1797—14) the *Commission* is authorized to reduce rates only when they are unreasonable, and that there is no evidence whatever to show that the rate of fare charged in the instant case was not reasonable. The *Commission* held that inasmuch as the rates charged yielded a return of more than seven and one-half per cent. per annum on the fair value of the property they were excessive, and because they were excessive they were unreasonable. This is at least the substance of the holding of the *Commission,* although the language used did not follow the statutory requirement very closely.

There is no formal finding that the rates charged were unreasonable, and under sec. 1797—14 the *Commission* does not have the power to change rates unless they are found to be unreasonable or discriminatory. The *Commission* does find that the rates charged were "somewhat higher than they should be." It then proceeds to fix a rate which it holds to be reasonable and adequate and which is considerably lower than that charged. There is a wide variance between the parties as to the amount of the annual reduction in revenue that will result from the order. Based on the 1913 business of the company, the estimates run from $17,695 to $35,095. The reduction in rates amounts to fifteen per cent. for those who desire to take advantage of the rate established. This is a substantial percentage, and the aggregate figures given are likewise substantial. If the rate found and established is a reasonable one, then the one which formerly existed was not so, and it follows that the *Commission* inferentially if not directly found the existing rate to be unreasonable. It must have been found excessive else no reduction would have been

made, and the difference between an excessive rate and an unreasonable one, if there is any, is purely theoretical.

It is argued that there is very little connection between the profit which a party makes out of a service performed and what it is worth, and that in determining the value of a thing like railroad transportation the question is not whether the profit is large or small, but what is the service actually worth to the public. It is also argued that this element was lost sight of by the *Commission* and that it based its idea of reasonableness solely on the amount of profit which plaintiff was making and regardless of what the service performed was worth.

The weakness of this test was no doubt apparent to counsel, because it was suggested rather than pressed. If it were adopted it would be extremely difficult for any one to say that a rate of ten cents a mile for carrying passengers on our railroads was unreasonable. So it is contended that the market value of the service should be deemed the reasonable value of it rather than its worth, and that inasmuch as a five-cent fare is charged in most cities, this fact establishes market value. If this should be established as a guiding principle, it would be impossible to make any compulsory reductions in rates no matter what economies might be practiced in the transportation business. Then it leaves out of account difference in conditions in different localities. A good many generalities which lead nowhere have been indulged in by courts and economists in reference to methods of establishing the value of railway properties, as well as the manner of determining the reasonableness of rates. Street railways are natural and necessary monopolies. At least such was the case before the advent of the "jitney" bus, and its usefulness is at least problematical. They are *quasi*-public corporations that are permitted to use the streets in the interest of public convenience and necessity. Our cities might, if they deemed it advisable, carry on the business themselves. So long as

they do not do so, it is pretty well established that the privately owned street railway should be permitted to earn its reasonable and necessary expenses, including a reasonable sum for depreciation, as well as a fair rate of return on the reasonable value of the investment. The amount of this return should be governed to some extent by the character of the management. A company that is on the alert to practice economies should have some part of the saving, else there would be no inducement to reduce the cost of the service. It is not our purpose here to discuss the elements that should be considered in fixing the cost of a service. It is not involved. But we think that net earning power is one of the most important elements to consider in ascertaining whether rates of fare are reasonable or otherwise. Where a monopoly is created by law, it is entirely proper and generally advisable that its power to take more than fairly belongs to it, to wit, a reasonable return on the reasonable value of the property, should be restricted. Investments of this character are permanent, and the risks are not very great unless bad judgment is used in building a road where there is no sufficient call for it to justify the expenditure. The cost of the service is the most definite and tangible guide there is to tie to in making rates, if indeed it is not the only one. Where rates are so adjusted as to yield a fair return on the value of the property over and above expenses and depreciation, they are reasonable. Where they are so fixed as to materially exceed this sum, they are not.

Was a reasonable rate of return allowed?

The evidence in this case showed that the city of Superior was a thrifty, growing municipality, and that the revenue of the plaintiff, generally speaking, had shown a substantial increase with the increase in growth. There is nothing to indicate that the investment is unstable or that the revenues in the future will not be sufficient to pay operating expenses, maintenance, and a reasonable return on the investment.

By taking an indeterminate permit the railway company may continue its business indefinitely unless the utility is condemned in the manner provided for, and then the property must be paid for. Plaintiff is not in a position to say that its franchise will expire at the end of a certain time and it may not be renewed, and, if not, its property will have a junk value only, and it consequently must charge rates high enough to secure it against this contingency. There is very little of the speculative element in investing in the securities of the plaintiff on the basis of the valuation fixed by the *Commission*. It would seem to be safe, sound, and secure. Where the matter of reasonableness ends and where unreasonableness begins is somewhat difficult of ascertainment. It is a question of fact which the *Commission* primarily should decide, and when it makes a decision and that decision is approved by the trial court, it cannot be disturbed by this court unless it appears that the decision is clearly wrong.

As before stated, the *Commission* held that a return of seven and one-half per cent. per annum on the reasonable value of the property involved would be fair and adequate; that the rate charged yielded a materially larger return than this, and that the rate to be charged should be so adjusted as to yield substantially seven and one-half per cent. The plaintiff insists that a rate of seven and one-half per cent., considering the character of the business and the risks which follow it, is not reasonable compensation for the investment. It is not claimed that a rate which will yield such a return is confiscatory, and it is obvious that it is not. It is said, truthfully enough we think, that there is a difference between a rate that is not quite low enough to be condemned as confiscatory and one which is in fact reasonable, and it is a reasonable rate which the *Commission* is called upon to fix. This may all be conceded. But there is a good deal of difference between a rate which affords the investor the substantial return of seven and one-half per cent. and one so low that it

can be said that it practically deprives the owner of the beneficial use of his property and would substantially confiscate it in whole or in part if permitted to stand. Allusion has already been made to the substantial character of the investment in this case and to its probable continuity. What is a reasonable return is a question of fact, the solution of which calls for the exercise of sound judgment and common sense. Undoubtedly there are some risks attendant on such an investment that are not found in the case of a well placed loan on real estate. But the *Commission* has taken this into account by allowing a higher rate of return than the ordinary real-estate loan yields. It is also true that there are some speculative ventures that promise to yield a larger rate of return, and in fact do if they are successful. But while the rewards may be greater in case of success, the chances of failure are also greater, and the *Commission* seems to have adopted an intermediate figure between these two classes of investments, and its judgment in this regard, confirmed by the trial court, should not be disturbed. An abundance of authority might be cited to sustain the finding of the *Commission* in this regard. One of the leading cases on the point is *Willcox v. Consolidated Gas Co.* 212 U. S. 19, 48, 29 Sup. Ct. 192.

Is order void because discriminatory?

It was held by the supreme court of the United States in *Lake Shore & M. S. R. Co. v. Smith,* 173 U. S. 684, 19 Sup. Ct. 565, that a state legislature could not fix a maximum rate of charge for the carrying of passengers and then compel the railroad company to sell mileage books at a lower rate, because such a law unjustly and unfairly discriminates against the purchaser of the ordinary trip ticket, and the law does not recognize wholesale and retail rates in matters of transportation.

It is argued that here a discrimination is practiced between those who desire to purchase only a single ride and in

favor of those who are able and willing to invest twenty-five cents in tickets. To so hold would amount to carrying the doctrine of discrimination to a ridiculous limit. The idea that it is a burden on any one who desires to patronize the street railway company to invest twenty-five cents in tickets is pretty far fetched. There is another and perhaps a better reason why the doctrine of the case above cited does not apply. The smallest fractional currency we have is one cent. A reduction in the rate of fare from five cents to four cents amounts to twenty per cent., and is a large reduction. It is not the law that a railroad commission, or the legislature for that matter, cannot reduce a rate of fare from five cents unless it reduces it to four, three, two, or one cent. Here the *Commission* evidently determined that a charge of four and one-sixth cents per passenger was as low as the rate should go. There is no way that such a rate could be put into effect without requiring the passenger to buy at least six tickets. Every one has a like privilege. The amount of investment here required in the first instance is too small to constitute a discrimination, and in the next place it is necessary that a bunch of tickets be sold such as was here determined upon in order to fix what is really a reasonable rate of fare.

Alleged undervaluation of property.

The *Railroad Commission* placed a value of $700,000 on the property of the plaintiff. This included all of the property in Wisconsin used for railroad purposes and some in Duluth which was used in connection with the running of the street-car system in Wisconsin. The circuit court also found on the evidence before it that the value of this property was $700,000. The plaintiff insists that its property was grossly undervalued, and devotes a large part of its brief to a discussion of this subject.

The *Commission* made an attempt to arrive at the actual cost of the property in question. For the purpose of arriving at the cost, an inventory taken in 1900 for the plaintiff, by

the firm of engineers before referred to, was used. Some items were omitted in the calculation, and it is claimed that others were undervalued. The cost of additions from 1900 to 1911 was then computed, and, from the aggregate, what was deemed to be a proper deduction for depreciation was made. This constituted one of the items of evidence on which the *Commission* based its judgment, although perhaps not an important one.

The *Commission* also ascertained the theoretical cost of reproduction new of the property, and made what it considered proper deductions for depreciation, and it appears from the testimony that this item of evidence was considered a very important factor in fixing the valuation finally determined upon. In addition to the two factors mentioned, the *Commission* made an allowance for "going value." According to the evidence, the allowance on this account usually varies from five to ten per cent. of the reproduction cost of properties of this character. It was stated that in round figures about $50,000 was allowed for going value in the present instance. While the sum of $700,000 is not the result of adding values found as to a number of specific items, it appears pretty clearly that the controlling factors in arriving at this value were cost of reproduction and going value.

The important objections made to the *Commission's* valuation are:

(1) The plaintiff insists that its franchise had a substantial value, and that the *Commission* erroneously refused to allow anything for this item of property.

(2) Certain real estate in the city of Superior, aside from easements, owned by the plaintiff and used for railway purposes was omitted from the appraisal made. The value of this property was $2,000.

(3) The plaintiff also claims that a *pro rata* share of its investment in the Duluth Amusement Company, amounting to $2,476, should be added to the value of its property in

Wisconsin, and that this item was erroneously disallowed by the *Commission.*

(4) An allowance of at least fifteen per cent. should have been made on the reproduction cost found, to cover the cost of engineering, interest on money during construction, mistakes, and unforeseen contingencies. Had the fifteen per cent. basis been used, it would have increased the so-called present value of the property $11,453.

(5) At least twenty per cent. should have been added to the estimated cost of material and labor, on the theory that a plant having all of its parts co-ordinated into a harmonious whole is worth that much more than the cost of items which enter into the plant. The allowance of this claim would have increased the reproduction value of the property $165,063.

(6) Items omitted from the appraisal made by the *Commission,* to the amount of $28,030, should have been allowed, and it undervalued certain other items to the amount of $32,682.41, from which should be deducted overvaluations aggregating $3,586, making a net undervaluation on both items of $57,126.41.

(7) A large portion of the city of Superior was platted by the Land & River Improvement Company. Before recording its plat it conveyed to plaintiff's predecessor an easement in the streets designated on its plat for street railway purposes. The plaintiff has succeeded to these rights, which it asserts were worth from $400,000 to $500,000. No account was taken of such rights by the *Commission* or by the court in arriving at the $700,000 valuation which was placed upon the property. Plaintiff insists that this action was unwarranted and unlawful.

(8) Plaintiff further urges that, by reason of the Duluth and Superior street railways being owned and operated by the same company, it was able to practice economies in the operation of its road in Wisconsin aggregating over $7,000 a

year, and that this fact should have been taken into account, but was not, in determining the amount of revenue it was reasonably entitled to earn.

Some minor contentions are made regarding errors and omissions of the *Commission,* but they do not call for separate treatment.

The two principal witnesses who testified before the court on values were Mr. Haugen of the tax commission, for the plaintiff, and Mr. Erickson of the *Railroad Commission,* for the defendant. These two men should be as well qualified to speak on the value of the property involved as any two men in Wisconsin. Mr. Erickson, with the aid of a trained corps of assistants, has been largely engaged for a number of years in valuing street railroads and other public utilities, as the reports of the *Railroad Commission* show. Mr. Haugen has been doing the same kind of work with like aids for taxation purposes. Both occupy important official positions; both are men of recognized standing and ability; and both were undoubtedly expressing their honest and candid judgments. The reproduction cost of the property was arrived at by engineers employed jointly by the railroad and tax commissions; so that both had the same data as far as this particular item of evidence was involved. It is not unusual to have high grade experts differ widely in giving evidence on values when they are called by private interests. The fact that the experts in this case were disinterested and were employed by the state does not seem to have affected the general rule.

Mr. Haugen, answering a hypothetical question which included the various elements which it was said in the *Appleton Water Works Case* (154 Wis. 121, 148, 142 N. W. 476) should be taken into account in fixing the value of a public utility, testified that the value of the plaintiff's property in Wisconsin was $1,100,000, or $400,000 in excess of the value fixed by Mr. Erickson.

The plaintiff insists that in view of the errors made in the

figures of the *Railroad Commission,* and of its failure to take into account numerous items of property that should have been included, and the other evidence in the case, the finding that the property was worth only $700,000 is not supported by the evidence and should be set aside, and the valuation made by Mr. Haugen adopted as being the true one. Attention is also called to the fact that the plaintiff's property in Wisconsin was assessed for the year in question at $1,100,000, and that it is unfair and unwarranted to place one value on a piece of property for rate-making purposes and to add about fifty-eight per cent. to this value for taxation purposes. This latter contention is persuasive, but not necessarily accurate. The earning power of a property of this kind has considerable influence in fixing its present value. Where returns are large the stock and bond value is affected, and this factor may be considered at least in ascertaining value for the purposes of taxation, and Mr. Haugen testified that it was considered by him. Excessive earnings may be and generally are the result of excessive rates, and if such earnings fixed in a large measure the value of the property involved, it would be impossible to materially reduce rates no matter how excessive they might be. Once the reasonable value of a street railway company is fixed for rate-making purposes, there might well be merit in the contention that the value fixed on such property for taxation should not materially exceed the value upon which the company is permitted to earn a reasonable rate of return. This question is not directly before us, and what is said is intended only to meet the contention of the appellant that its property should not be valued by the state at $700,000 for one purpose and at $1,100,000 for another, where the lower value results in ordering a substantial decrease in its earning power and the higher one imposes an excessive burden in the way of taxation. Once the state has fixed a value for rate-making purposes and restricted the earning power of the road to a reasonable return on such value, it would seem rea-

sonable to claim at least that the property could not have a materially higher value for purposes of taxation. While a valuation for taxation purposes may not fix the value for rate-making purposes, it may well be that a valuation for the latter purpose might substantially fix the value to be found for the former.

The question before us is whether the *Railroad Commission* made substantial errors in its method of fixing value, and whether Mr. Haugen adopted the correct method. As we understand his testimony, he took into account the physical value of the property, its earning power, and the franchise. It is probable that he also considered "going value," although he does not mention it specifically. He made no attempt to place any specific value on the franchise, but added about $400,000 to the physical and perhaps going values to cover the franchise value and the enhanced value because of earning power. Except as the *Railroad Commission* treated the plaintiff as a going concern capable of earning substantial returns on its Wisconsin property, it apparently added nothing for the franchise and nothing because of the fact that the company was earning an excessive amount on its property in this state. So the difference between the values fixed by the two experts for rate-making purposes arose quite largely from their different concepts of what considerations should be taken into account in fixing values.

Franchise value.

(1) A reading of the testimony would lead to the conclusion that the *Commission* did not consider the plaintiff's franchise of any value and made no allowance therefor. It is true that no certain definite sum was fixed which represented the franchise value. We have no inclination to say that the *Railroad Commission* did things which it says it did not do, and still we think it necessarily took the plaintiff's franchise into account in fixing the value of its property. It was the franchise which gave the plaintiff the right to

operate its cars in the public streets. Without a franchise to operate the property a large part of it would have only junk value. The *Commission* valued the property on the basis that plaintiff was a going concern, having not only the right to operate its cars presently, but also in the future, so long as it owned the property. It may not be correct to say that the difference between junk value and value as a going concern represents the value of the franchise, but it would seem clear that when value is fixed on the theory that the right to operate the property will be continuous (and that is the important right given by the franchise) an allowance is necessarily made for franchise value. *Chicago & N. W. R. Co. v. State,* 128 Wis. 553, 108 N. W. 557. Be this as it may, we hold that where, as here, the right exists at any time to regulate the rate of charge, all the allowance is made for franchise that should be made when a fair value is fixed upon the property based on the assumption that the business is a going one and that the owner will be permitted to carry it on in the future unless the municipality elects to buy for full and fair value. If the plaintiff had a contract which entitled it to charge a five-cent fare until the expiration of its franchise and thus earn large returns in the meantime, such a franchise might be worth a good deal, but such a case is not before us. Where, as here, only a reasonable rate may be charged under a franchise, it is difficult to see where it has very much value aside from the value of the privilege to operate, and that, as it appears to us, has been taken care of. *Willcox v. Consolidated Gas Co.* 212 U. S. 19, 29 Sup. Ct. 192.

Items (2) and (3).

Item (2) should have been taken into account. Its omission was clearly an oversight. We are not satisfied that the *Commission* was not correct in disallowing item (3). An amusement park in Duluth might enhance the earnings of the plaintiff in Duluth and therefore be a paying investment, but it is not apparent that such an establishment was of any value

to the part of the property in Wisconsin. Besides, these two items, aggregating only $4,476, are too small to exert any influence over the final results arrived at in the case. These items might be considered substantial if this were a condemnation proceeding; but a variance of a few thousand dollars one way or the other would not have resulted in any different order in the instant case.

Allowance for engineering, etc.

(4) It is of course apparent that a plant earns nothing during construction, although money may be invested in it for a considerable length of time. Further, that engineers must be employed and paid, and that some mistakes are bound to occur which will add something to the theoretical cost of the plant. In building an ordinary house it is easy to figure the cost in advance, but difficult in practice to keep within these figures. So in figuring reproduction cost it is usual to allow a lump sum to cover costs and contingencies of the character specified. This lump sum is figured as a certain percentage of the reproduction cost. Naturally there is a wide variance between experts and engineers as to what the per centum of allowance should be. The plaintiff claims from fifteen to twenty per cent. The *Commission* allowed twelve per cent. There is certainly evidence to support the finding of the *Commission,* and inasmuch as it was approved by the trial court it will not be disturbed by this court.

Value of separate items which make up a plant as compared with value of plant after these items are co-ordinated.

(5) The claim made under this head is a large one, amounting to $165,063, and is based on the testimony given by Mr. Warren, the plaintiff's manager, to the effect that a co-ordinated plant was worth twenty per cent. more than the estimated cost of the items of property, labor, and material which go to make it up. This would seem on its face to be a pretty extravagant claim. Whether it is or not does not appear to be very material. As we understand the evidence,

the *Railroad Commission* determined what it would cost to reproduce the plant in the condition it was at the time of the hearing. This necessarily included the cost of co-ordination, and we think also its value. The reproduction cost of an article as an entirety necessarily includes the cost of putting it together. If Mr. Warren's evidence means, for instance, that after a new plant has been economically constructed twenty per cent. should be added to the sum expended to get at the actual cost, his claim could not be allowed.

Alleged omissions and undervaluations by the Railroad Commission.

(6) An attempt was made to arrive at the original cost of the property and also what it was worth on the basis of cost after making reasonable deductions for wear and tear, obsolescence, etc. The inventory made by Ford, Bacon & Davis was used as a starting point, and a value of $451,197 was placed on the property inventoried by them. To this amount was added the cost of additions from the time that inventory was made until the time of the hearing, which was ascertained to be $285,865. The value of the Duluth property used in connection with the running of the street railway in Superior was ascertained to be $87,944, making a total of $825,006. From this amount the sum of $61,929 was apparently deducted on account of track taken up, leaving a balance of $763,077. There is some discrepancy between the figures found in the testimony and this balance, the *Commission's* figures actually being $753,077. To this was added on the trial the sum of $28,030, for the cost of certain items omitted from the engineers' valuation, and also the sum of $30,940 to cover some differences on account of track taken up. The sum of these items was intended to cover the cost new, and amounted to $822,047, but appears in the record as $812,047. The *Commission* then ascertained as best it might the value of the plant on the basis of cost, after deducting what was thought to be a reasonable sum for depre-

ciation. The value of the property inventoried by Ford, Bacon & Davis in 1900, less depreciation, was found to be $257,333. The additions thereafter made were found to be worth $181,490, and the value of the Duluth property used in connection with the Superior plant, properly depreciated, $58,920. To this was added a depreciation charge found on the books of the company amounting to $95,362, and working capital of $20,000, making a total of $613,105. From this total was deducted for track taken up, $37,157, leaving a balance of $575,948. Mr. Erickson, in his testimony, stated that to this sum might properly be added some items that were omitted and some errors in figuring in relation to track taken up, amounting to $39,520, making the total value on the basis of cost $615,468.

It is claimed that some additional allowance should be made for undervaluations, but if the undisputed testimony be taken as true, that substantially $50,000 was allowed for going value, then the omission of those items would not cut any particular figure. It was shown in the testimony that, while the ascertainment of cost is desirable, it is not a safe guide to tie to and is not considered especially important in arriving at final results. At least no such importance is attached to it as is to reproduction cost. This is due to the fact that it is very difficult in most cases to arrive at cost where a plant has been constructed for a long time, and it is also difficult to ascertain whether the cost has been kept within reasonable bounds.

It is quite apparent from the whole testimony that if the omitted items had been considered by the *Commission,* and it had allowed the valuation on other items contained in Exhibits 117 and 118 of the record, which it was claimed should have been allowed, the final result would have been precisely the same.

The cost of reproduction new was found to be $805,482, and the depreciated value of the property, because of wear

and tear and the like, was found to be $651,605. As we understand the testimony, there is no claim that in ascertaining this reproduction cost any items of property were omitted. Neither is it claimed, as we understand the testimony and the concessions of counsel, that the cost of reproduction new and this cost less depreciation were not correctly ascertained by the *Commission,* except in one particular, and that relates to the allowance of twelve per cent. to cover the cost of engineering, etc., instead of an allowance of fifteen per cent. which the plaintiff claims should have been made. This contention has already been treated. On this basis an allowance of substantially $50,000 was made for going value, and there is little evidence that would justify the allowance of a materially larger sum on this account. If the method of ascertaining value which was pursued was a proper one, we think the finding of the *Commission* is well sustained by the testimony, provided error was not committed in excluding an item of property which will next be considered.

Value of easements.

(7) The amount claimed for right-of-way easements conveyed by the Land & River Improvement Company is large,—from $400,000 to $500,000. Nothing was allowed by the *Commission* for them. The respondent insists that the easements were void because repugnant to the grant to the public by the dedication, and that in any event they were worth nothing in connection with the railway property. The purpose of the grant of right of way presumably was to insure to the grantee the right to build a street railroad in the city to the exclusion of all other persons. The validity of such attempted disposal of an interest in a street already laid out on a plat which was intended to be and was soon thereafter recorded, may well be doubted. A court would hesitate to hold, except where the law was plain, that a person platting land could put it within the power of an individual to block

or even hamper the building of an improvement like a street railroad. We do not find it necessary to decide the question.

The plaintiff could not lay its rails or operate its cars without the consent of the city. Such consent was given and the railroad was built and operated, in pursuance of the franchise granted by the town of Superior and the one subsequently granted by the city, for a period of over twenty years. It is difficult to see wherein the easement granted by the Land & River Improvement Company was used or useful in carrying on the plaintiff's business, unless it might be in one particular, to which reference is not made and concerning which there is no proof. It is not pointed out in what respect the plaintiff has been better off in the past or will be better off in the future by reason of the conveyance of this easement. The evidence neither shows nor tends to show benefit. It may be that if the plaintiff desired and should be permitted to carry freight in the future, this grant, if valid, would be beneficial in dealing with abutting owners who made a claim that an additional servitude was being imposed on their property. The same might be true in regard to the running of interurban cars. But no evidence was directed toward these matters, and there is nothing to indicate that the rights attempted to be conveyed have anything more than a shadow of value. The evidence of two witnesses, to the effect that these rights which were attempted to be conveyed for the nominal sum of $10 in 1884 are now worth $400,000 to $500,000, is well nigh ridiculous.

Economies from joint operation.

(8) This contention would argue perhaps for a more liberal return in the way of income rather than an increase in valuation. The plaintiff claimed a large saving by reason of the car lines in the two cities being under one management and control and supplied with power from a single plant. Mr. Erickson admitted that theoretically there should be

some saving, but that practically such method of operation did not result in economy, or, if it did, the amount saved was so small as to be negligible. There is simply a dispute in testimony on this point, which we assume the court resolved in favor of the defendant.

Method of arriving at valuation.

It is apparent that a substantial sum was allowed for going value. This allowance necessarily presupposed and took into consideration the fact that the property was in a position to earn a fair return on the reasonable value of it. A plant that has been in existence as long as this one that was incapable of paying dividends might of course have a going value, but it would be very small. Such a property would hardly be salable at the bare cost of reproduction less depreciation. As stated before, a franchise value, or at least something akin to it, was necessarily taken into account.

It is said in the *Appleton Case* (154 Wis. 121, 142 N. W. 476) that the value of the plant and business is an indivisible gross amount and that it is not obtained by adding up a number of separate items, but by taking a comprehensive view of each and all of the elements of property, tangible and intangible, including property rights, and considering them all, not as separate things, but as inseparable parts of one harmonious entity and exercising the judgment as to the value of that entity.

What the *Commission* here did was to fix a value on the property of the plaintiff as a whole. The *Commission* seems to have taken into account every kind of property, tangible and intangible, which should be considered in fixing a valuation. No doubt the reproduction cost was considered a very important item in arriving at the value of this plant, and we think correctly so. But the value was not fixed on the basis of what it would cost to reproduce the plant. It is important that some method of arriving at value be worked out which has something tangible for a basis, if such method be possible

and does not work injustice to the utility owner or the public. Mere opinions on the value of property of this kind, based on superficial observation, are of little value. We think the *Commission* did not adopt an erroneous theory as to how value should be fixed, and that its finding on value is fairly sustained by the evidence.

We desire to acknowledge our indebtedness to counsel for the clear and concise presentation made of the numerous questions involved in their briefs and oral arguments. They have done their full duty by their clients and the court.

By the Court.—Judgment affirmed.

MARSHALL, J., dissents for reasons stated at length in *Milwaukee E. R. & L. Co. v. Railroad Comm.* 153 Wis. 592, 630, 142 N. W. 491, and *Minneapolis, St. P. & S. S. M. R. Co. v. Menasha W. W. Co.* 159 Wis. 130, 138, 150 N. W. 411.

A motion for a rehearing was denied, with $10 costs, on October 5, 1915.

COLBURN, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

May 5—October 5, 1915.

Railroads: Injury to passenger: Suitcase falling from rack: Negligence: Burden of proof.

To entitle a passenger to recover from a railway company for injuries caused by a suitcase falling upon him from the rack above where he was sitting, he must show by a preponderance of the evidence that the suitcase had been in the rack for such a length of time that in the exercise of ordinary care the company's employees should have discovered and removed it.

APPEAL from a judgment of the municipal court of Brown county: N. J. MONAHAN, Judge. *Reversed.*

Plaintiff brought this action in the municipal court of Brown county to recover damages for injuries alleged to have been sustained while riding as a passenger on one of defendant's passenger trains between Escanaba, Michigan, and Oconto, Wisconsin. The complaint alleged that plaintiff had been on the train about two hours, occupying a seat in the coach commonly known as the "smoker;" that as the train was approaching the city of Oconto a trunk or large suitcase fell upon him from the rack directly above the seat in which he sat, striking him in the abdomen. The complaint further alleged that the suitcase was in the rack when plaintiff entered the seat at Escanaba, and that the defendant was negligent in permitting so large an article to be placed in the rack and in allowing it to remain there for so long a time without discovering and removing it and in failing to warn the plaintiff of the danger incident thereto. The answer was a general denial. The jury returned the following special verdict:

"(1) Was the plaintiff on the 30th day of March, 1914, while riding on one of defendant's trains, struck and injured by a valise falling from the parcel rack? *A.* Yes.

"(2) If you answer question No. 1 'Yes,' how long had said valise been in the parcel rack before it fell? *A.* Don't know.

"(3) Was said valise of such size and shape that it was apparent that it could not be safely carried in said parcel rack? *A.* Yes.

"(4) If you answer question No. 3 'Yes,' then did the conductor or brakeman, or either of them, know that said valise was in the parcel rack for a sufficient time before it fell, so as to be able to remove it? *A.* No.

"(5) Ought said conductor or said brakeman, or either of them, in the exercise of ordinary care, to have discovered the presence of the valise in the parcel rack in sufficient time to have removed it before it fell? *A.* Yes.

"(6) Was the said conductor or said brakeman, or either of them, guilty of any want of ordinary care in failing to remove the valise from the parcel rack before it fell? *A.* Yes.

"(7) If you answer question No. 3 'Yes,' that said grip

was of such apparent size and shape that it could not be safely carried in said parcel rack, then was plaintiff guilty of any want of ordinary care in failing to see said valise in the parcel rack and remove the same before it fell? *A.* No.

"(8) If the court is of the opinion that the plaintiff is entitled to recover, what amount of money will compensate him for his injuries? *A.* $625."

From a judgment entered on such verdict defendant appeals.

Edward M. Smart, for the appellant.

For the respondent there was a brief signed by *Minahan & Minahan,* and oral argument by *Victor I. Minahan.*

The following opinion was filed June 1, 1915:

BARNES, J. The running time of the train between Escanaba and Oconto was about three hours. The plaintiff was unable to state how long he was on the train before he received his injury, but thought he might have been hurt an hour and a half after he got on, or a half or three quarters of an hour before he got to Oconto. He did not change his seat and was sure that he did not fall asleep. He did not notice whether the grip was in the rack when he boarded the train. He did not see it until it fell on him, and did not observe any one put the grip in the rack while he was on the train. He testified that if it was so placed he might have observed that it was being placed there and he might not. There were quite a few passengers and also some vacant places in some of the seats. Plaintiff did not know how many persons got on and off at stations. He also testified that, when he said that no one to his knowledge placed the grip in the position it occupied after leaving Escanaba, what he meant was that he did not see any one put it there. Certain train employees testified that they made it a practice to observe whether parcels were so placed in the racks as to endanger passengers and that they did not observe the grip in question. The jury found lack of actual knowledge, but also found that in the exercise of ordinary

care the trainmen should have discovered and removed the grip.

It was incumbent on the plaintiff to show that the employees of the defendant did not exercise that degree of care for his safety that the law imposed on them. In the present case it was necessary to show by a preponderance of the evidence that the grip was in the rack sufficiently long so that such employees in the exercise of such care should have discovered and removed it. The plaintiff has not met this burden. It is a matter of pure speculation how long the grip had been in the rack before it fell. It is not a case where conflicting inferences might legitimately be drawn from the evidence. What the fact is, is a matter of conjecture pure and simple.

By the Court.—Judgment reversed, and cause remanded with directions to dismiss the complaint.

A motion for a rehearing was denied, with $10 costs, on October 5, 1915.

Sterling Engineering & Construction Company, Respondent, vs. Berg and wife, Appellants, and others, Respondents.

May 7—October 5, 1915.

Mechanics' liens: Findings: Evidence: Building contract: Construction: Custom: Material for stairways: "Blind nailing" of interior finish: Compensation of architect for extra work: Consolidation of actions: Bringing in parties inadvertently omitted: Accounting between owner and contractor: Claim for payment of order: Extras: Waiver of conditions in contract: Costs: Taxation: Appeal: When costs limited.

1. Findings of fact by the trial court in an action to foreclose mechanics' liens are, without discussion, *held* to have such support in the evidence that they cannot be set aside as being contrary to the clear preponderance thereof.

2. Concrete stairs are not so customary and usual in construction work that where some are marked "concrete" on the plan of a building it will be inferred that all are to be of such material—especially where it appears that the owner was undecided whether to construct them of iron or of concrete at the time the contract was let.
3. A finding that, as to the interior finish of a building, driving the nails in with a nail-set and concealing them with putty and paint was in accordance with a contract requiring "all nailing to be blind nailed," is *held* not to be contrary either to the evidence or to the established use of the term "blind nailing" as applied to such work.
4. After an architect had prepared plans and specifications for a three-story building pursuant to a written contract by which, for such work and for superintending the construction, he was to receive one per cent. of the cost of the building, the owner changed his mind and at his request the architect prepared plans and specifications for a fourth story and also superintended the construction of a part thereof. *Held*, that in the absence of any agreement as to compensation for such extra work the architect was entitled to receive the reasonable value thereof.
5. An order consolidating several actions to foreclose mechanics' liens may afterwards, by an order *nunc pro tunc*, be corrected so as to bring in parties to one of the original actions who had been inadvertently omitted in the first order.
6. With the consent of the owner a contractor drew an order upon him in favor of a subcontractor for the amount due to the latter, which was less than the owner owed the contractor. The owner refused to pay the order, but afterwards paid a judgment entered against him thereon with costs. *Held*, that as against the contractor who drew the order the owner was entitled to credit for the original amount thereof only.
7. Although a building contract provides that extras shall be ordered in writing, recovery may be had against the owner for extras put in at his oral request or with his knowledge and consent.
8. Although the architect cannot without express authority waive important conditions in a building contract, the parties themselves may do so.
9. In a consolidated action to foreclose several mechanics' liens the findings of the trial court are not in this case properly subject to the criticism that they are too long and needlessly duplicated.
10. The costs taxed in an action to foreclose mechanics' liens are *held* not so large as to warrant this court in reducing them under the rule of *Krueger v. Buel*, 153 Wis. 583.
11. If dissatisfied with the clerk's taxation of costs, a party should appeal therefrom, and then upon exceptions to the order of the trial court retaxing the costs the supreme court can review it.

12. Sec. 2919, Stats. 1913, limiting costs, does not govern a consolidated action to foreclose mechanics' liens of several contractors upon a building.

Appeal from a judgment of the circuit court for Milwaukee county: Lawrence W. Halsey, Circuit Judge. *Affirmed.*

Action to foreclose mechanics' liens upon a building owned by *Ludwig Berg* and *Fredericka Berg,* his wife. Six lien claimants, who have proved their claims, were joined in this consolidated action as parties defendant. Three other claimants who were also joined as defendants failed to appear and prove their claims. Findings of fact determining the amount due each claimant were made by the trial court and judgment awarding each a lien for the amount so found was entered. The defendants *Ludwig Berg* and *Fredericka Berg* appealed from the judgment.

For the appellants there was a brief by *Leutermann & Timmermann* and *A. W. Richter,* attorneys, and *Moritz Wittig,* of counsel, and oral argument by *Mr. Richter, Mr. M. J. Leutermann,* and *Mr. Wittig.*

G. J. Davelaar, for the respondents *Sterling Engineering & Construction Company, B. J. Bruns,* and *Philip* and *P. J. Matt.*

Max P. Kufalk, for the respondent *Chrisien.*

Waldemar C. Wehe, for the respondents *Neuman & Mueller.*

For the respondent *Nelson* the cause was submitted on the brief of *O. W. Kreutzer.*

The following opinion was filed June 1, 1915:

Vinje, J. This case presents but few questions of law and those of slight importance. Findings of fact made by the trial court and challenged by the appellants aggregate nearly 100. The labor of checking up each finding to see if it is supported by credible evidence has been considerable.

Such labor, however, has been much lightened by the methodical manner in which the briefs of the respective parties were prepared.

In the main the judgment is challenged because the court found a substantial performance of the different contracts; because it found as extras items claimed to be included under the contracts; because it allowed for extras not ordered pursuant to the terms of the contracts; because extras were allowed for at more than their reasonable value; and because it refused to allow damages for alleged failures to perform according to contracts. Appellants also claim that the architect, *Bruns,* who is a lien claimant, acted in collusion with the other claimants and so rendered it difficult for them to prove their defenses and counterclaims. That the case was thoroughly tried by the parties and carefully considered by the trial court is evident from the findings made by it, which for the seven claimants cover nearly fifty printed pages, and also from the fact that it carefully viewed the building after the evidence was taken.

No advantage would accrue to the legal profession from a discussion of claims as to which the findings of fact are affirmed on the ground of sufficient evidence to sustain them and which involve no questions of law. Over ninety per cent. of the case relates to such findings, and as to them the parties will have to rest content with our assurance that all have been carefully examined and have been found to possess such support in the evidence that they cannot be set aside as being contrary to the clear preponderance thereof. They must therefore stand as the facts in the case. *Keilly v. Severson,* 149 Wis. 251, 135 N. W. 875. The practice of not discussing issues resting upon findings of fact that are sustained on appeal has often been followed by the court in the past. See *Hay v. Randles,* 152 Wis. 632, 140 N. W. 333; *First S. & T. Co. v. Milwaukee Co.* 158 Wis. 207, 242, 148 N. W. 22, 1093. That it will be indulged in more frequently in future is evident

from the recent adoption of Rule 64, which provides that "In cases where the order or judgment is affirmed opinions will not hereafter be written unless the questions involved be deemed by this court of such special importance or difficulty as to demand treatment in an opinion." Applying this rule to the present case but few findings of fact need be discussed. Those selected are believed to have some value because they involve a construction of building contracts, or of the terms used therein, or present some legal question.

The *Sterling Engineering Company* contracted to do the concrete work on the building according to plans and specifications submitted to it. Such plans showed no stairway marked "concrete" to the basement nor stairs so marked from the second story either in the rear or center part of the building. There was evidence to the effect that *Berg* was undecided as to what material should be used for such stairways at the time the contract was let and that he afterwards ordered them made of concrete. The contractor was not called upon to furnish more concrete construction under his contract than the plans and specifications could be reasonably construed to call for. Concrete stairs are not so customary and usual that where some are marked "concrete" on a plan it will be inferred that all are to be of such material—especially where, as here, the evidence shows that the owner was undecided whether to construct them of iron or of concrete at the time the contract was let. Of course a situation might well arise where the marking of one or more stairways as concrete might be held to include other unmarked ones. But such is not the case here. The trial court properly allowed for the concrete stairs mentioned as extras.

The carpenter contract provided in one place that "All nailing in interior finish shall be done with finishing nails and as far as possible concealed from sight," and in another place, "All nailing to be blind nailed in the best workmanlike manner." Appellants claim and their evidence shows that

by "blind nailing" is meant raising a chip of the wood, driving the nail under the raised chip and gluing the chip over the nail. The respondents' evidence is to the effect that "blind nailing," in a contract relating to interior finish of a house, means driving the nail in with a nail-set and concealing it with putty and paint; that the nailing described by appellants is used almost exclusively in cabinet work and is known as "chip nailing." The court held with the respondents and found the nailing was according to contract. We cannot say the finding is contrary either to the evidence or the established use of the term "blind nailing" as applied to the interior finish of a house.

The court's finding that the architect acted in good faith throughout is supported by the evidence. It is claimed, however, that even if he did, the court allowed him too much. He entered into a written contract to prepare plans and specifications and superintend the construction of a three-story building for one per cent. of the cost thereof. For this he was allowed $439.16. After he had prepared plans and specifications for a three-story building the owner changed his mind and wanted a four-story building. He requested the architect to prepare plans and specifications for such a building, which he did, and he superintended the construction of a part of the fourth story also—but not all of it. Nothing was said as to his compensation for the work on the fourth story. The appellants claim he should receive but one per cent. for it, namely, the same as the compensation mentioned in the written contract for the three-story building, while the architect claims he is entitled to recover the reasonable value of the extra services shown by the evidence, namely, two per cent. for preparing plans and specifications for the fourth story and three per cent. for superintending the construction thereof, so far as it was completed when he severed his connection with the work. The court allowed him the reasonable value of the extra services, which amounted to

$176.66 and $131.49 respectively. A majority of the court are of the opinion that the contract compensation for the three-story building does not measure the compensation he should receive for the extra labor and that the court properly allowed him the reasonable value thereof as shown by the evidence.

The claim that *Philip Matt* and *P. J. Matt* are not parties to the suit is not supported by the record. They were made parties to the suit of *Nelson* against appellants, but in drawing the order consolidating the different suits they were inadvertently omitted. Afterwards by an order *nunc pro tunc* they were made parties, replied to the counterclaim by a general denial, and evidence as to their claim came in without objection that they were not parties to the suit. The court had power to correct the order of consolidation by an order *nunc pro tunc,* and properly did so.

The *Matts* owed August C. Beck & Son, a subcontractor, the sum of $398.44. With the consent of *Berg* they drew an order upon him for that amount in favor of August C. Beck & Son. *Berg* refused to pay it, and it was put into a judgment amounting with costs to $517.25, which he has since paid. He claims a credit against the *Matts* of the amount of the judgment. They say the credit should be the amount of the order. At the time the order was given the court found that there was due on contract and extras an amount in excess of the order. The evidence sustains such finding. The court properly allowed *Berg* a credit for the amount of the order only.

Many exceptions were taken to findings allowing for extras on the ground that they had not been ordered in writing as the contracts provided. The evidence shows that they had either been ordered orally by *Mr. Berg,* the owner, or they had been put in as extras with his knowledge and consent. In either case the extras were properly allowed. An oral request made by one party to a written building contract and

complied with by the other, if contrary to the contract, modifies it to that extent. So also knowledge of and acquiescence in the fact by the owner that extras are being put in by the contractor imply a promise that the owner will pay their reasonable value. *Wambold v. Gehring,* 109 Wis. 122, 85 N. W. 117. While the architect cannot without express authority waive important conditions in a building contract, the parties themselves may do so. *J. G. Wagner Co. v. Cawker,* 112 Wis. 532, 88 N. W. 599.

The clerk taxed costs in favor of the seven lien claimants to the amount of $501.88, of which $258.88 was in favor of the *Sterling Engineering Company* and $69 of the latter amount was for twenty-three days' attendance upon court during trial. Appellants say the findings are too long and are needlessly duplicated. We think they are not properly subject to such criticism, nor are the costs taxed so large as to warrant this court in reducing them under the rule of *Krueger v. Buel,* 153 Wis. 583, 142 N. W. 264.

The appellants took no appeal from the clerk's taxation of costs. This they should have done if they were dissatisfied with it, and then, upon exceptions to the order of the trial court retaxing costs, this court could review it. *McHugh v. C. & N. W. R. Co.* 41 Wis. 79; *Rollins v. Kahn,* 66 Wis. 658, 29 N. W. 640; *Pormann v. Frede,* 72 Wis. 226, 39 N. W. 385. The case of *Allis v. Meadow Spring D. Co.* 67 Wis. 16, 29 N. W. 543, 30 N. W. 300, cited by appellants, was a retaxation of costs in this court and is not applicable. Neither does sec. 2919, Stats. 1913, govern a case of this kind.

The only bill of costs returned with the record is that of the *Sterling Engineering Company,* and the court, if it could review the taxation of costs, would find itself in the predicament of appellants' counsel where they say in their brief, "If we were in a position to know or learn what costs the court allowed to each of the lien claimants we would be in a position

to have the court pare the bill down to the proper amount." They then considerately add: "How the court will pare it down we must leave to its discretion." For the reasons stated the court declines to exercise its discretion.

As to a great many items the evidence was sharply conflicting and would have supported findings different from those made. But, as before stated, the evidence was carefully considered by the trial court, and in addition to the usual advantages which it has in determining the truth upon conflicting evidence it also viewed the premises after all the evidence was taken. This enabled it more correctly to apply the evidence and determine the probative force of the testimony of the different witnesses. Failing to find a clear preponderance of the evidence against any finding made or any error in applying the law to them, it results that the judgment must be affirmed.

By the Court.—Judgment affirmed.

A motion by the appellants for a rehearing was denied, with $25 costs, on October 5, 1915.

CALLAHAN, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

May 7—October 5, 1915.

Railroads: Injury to employee: Action under federal or state law? Pleading: Amendment after proof: Harmless errors: Special verdict: Discretion: Negligence of fireman running engine: Violation of rule: Scope of authority: Abrogation of rule: Verdict contrary to instructions: Perversity: Excessive damages.

1. In an action for injuries to a railway employee the complaint did not allege that he was engaged in interstate commerce at the time of his injury, but the answer alleged and the undisputed evidence showed that fact, and the court submitted the case to the jury as one covered by the federal statute. *Held*, that there

was no error in such submission and that the complaint should be treated as amended as of course to conform to the proofs.

2. Refusal in this case to submit the issues for a special verdict, the demand therefor by defendant having come too late to make it a matter of right under sec. 2858, Stats., is *held* not to have been an abuse of discretion.

3. In an action for injuries to a railway employee the complaint alleged as negligence the violation of a rule of the defendant company by another employee. At the trial defendant admitted the rule had been violated, but claimed that in violating it the other employee had acted outside the scope of his authority, and that defendant was not liable for his acts. Against objection, plaintiff then introduced evidence that the rule had been abrogated by long-continued practice to the contrary and acquiescence therein by defendant, and afterwards the complaint was ordered amended so as to allege that the rule had been abrogated. Defendant made no affidavit of surprise. *Held*, that the matter rested in the discretion of the trial court, and that the error, if any, in admitting said evidence before amendment of the complaint was in this case harmless.

4. Even if, in attempting to run an engine in the absence of the engineer, in violation of a rule of the company, a fireman was acting outside the scope of his authority so that the company was not liable for his negligence, the company is nevertheless liable for negligence of the engineer in directing the fireman to do as he did and in failing to operate the engine himself.

5. The fireman of an engine who, in furtherance of the railway company's business, attempts to run the engine himself by the direction but in the absence of the engineer, although he thereby violates a rule of the company is not acting without the scope of his authority so as to exempt the company from liability for his acts.

6. A verdict contrary to an erroneous instruction is not necessarily perverse. Thus, where defendant's negligence was clearly proven and the jury found such negligence, even though in so doing they acted contrary to erroneous instructions, this court declines to hold the verdict a perverse one, the trial court having refused to set it aside on that ground.

7. An award of $13,000 for a fracture of the leg of a locomotive engineer twenty-nine years old and earning $1,800 per year is *held*, though large, not to be clearly excessive, it appearing that unusually bad results flowed from the injury, which for a long time wholly incapacitated him for work and permanently precluded him from resuming work as such an engineer, and there being evidence from which a jury might well say that his earning capacity was decreased forty or fifty per cent. MARSHALL, J., dissents.

Appeal from a judgment of the municipal court of Langlade county: T. W. Hogan, Judge. *Affirmed.*

This was an action to recover damages for personal injury. The plaintiff was a locomotive engineer and was injured in a collision at Aniwa station on the defendant's line in February, 1913. Plaintiff was taking his engine, number 980, from Wausau to Antigo, and was running light. On reaching Aniwa a freight train was overtaken, and it was decided to allow the plaintiff's engine to run ahead of the freight train, which was also destined for Antigo. The plaintiff backed his engine onto a sidetrack, and the other engine, number 1071, was backed south of the sidetrack switch by its fireman under orders from the engineer in charge of it, so as to permit plaintiff's engine to go ahead. Plaintiff's engine proceeded northward to the station, where a stop was made. Engine number 1071 also proceeded northward, and ran into plaintiff's engine as he was about to step therefrom onto the platform, so that he was caught between the engine and the tender and severely injured. The negligence alleged was that the collision was caused by the fault and negligence of the defendant and its employees in violation of their duties to the plaintiff, "because, for the reason, and in that (a) said engine number 1071 was managed, operated, driven, and run by defendant's said other employees in charge thereof in a careless, reckless, and negligent manner; (b) said engine number 1071 was being managed, operated, driven, and run by defendant's said other employees in charge thereof contrary to and in violation of defendant's rules, regulations, directions, and requirements and the established customs and practices, upon which rules, regulations, customs, and practices, and the compliance therewith, the plaintiff relied." The complaint also alleged negligence in failing to ring the bell and sound the whistle on engine number 1071 and in running said engine at an excessive rate of speed. The two last named items of negligence do not appear to have been relied

on in the trial. There is no allegation in the complaint to the effect that the plaintiff was employed by the defendant in interstate commerce. The answer set forth that the defendant was engaged in interstate commerce and that at the time of the injury the plaintiff was employed in interstate commerce. The answer also denied negligence on the part of the defendant and alleged contributory negligence on the part of the plaintiff. The case was submitted to the jury on a general verdict. The jury found for the plaintiff and assessed his damages at $13,000. From a judgment entered in accordance with such verdict the defendant appeals.

Edward M. Smart, for the appellant.

Stephen J. McMahon, for the respondent.

The following opinion was filed June 1, 1915:

BARNES, J. The issues involving the real merits of this case were those usually met in the ordinary personal injury action. The difficulties arise largely out of alleged defects in pleading and the charge of the court.

There was no allegation in the complaint that the plaintiff was engaged in interstate commerce at the time he was injured or that his cause of action was controlled by the federal act of 1908, 35 U. S. Stats. at Large, 65, ch. 149. The answer set forth that the plaintiff was engaged in interstate commerce at the time of his injury. The complaint was not amended in this regard. The court charged the jury that the uncontradicted evidence showed that the action was governed by the federal law, and submitted the case on this basis. The appellant insists that this was error, and that one cause of action could not be pleaded and another proven and recovery be had on the new cause of action without an amendment to the pleading. The defendant could hardly have been surprised, inasmuch as it pleaded the fact in its answer as the court found it to be. The proof being undisputed, the complaint should be treated as amended as of course to conform to the

proofs. *Bieri v. Fonger,* 139 Wis. 150, 154, 120 N. W. 862, and cases cited; *Wabash R. Co. v. Hayes,* 234 U. S. 86, 34 Sup. Ct. 729; *Graber v. D., S. S. & A. R. Co.* 159 Wis. 414, 150 N. W. 489. There are very persuasive reasons why the rule stated should apply to cases of this kind, where it is often a matter of doubt whether the state or federal law is applicable.

Error is alleged because the court refused to submit the issues in the form of a special verdict. The demand was not made until the evidence was all in on both sides, hence it came too late to enable the defendant to insist on such a verdict as a matter of right. Sec. 2858, Stats. We would have been better satisfied had the request been granted. There is some ground for complaint on the part of the defendant that it was inconsiderately dealt with. The complaint was drawn on the theory that the federal law did not apply. Sub. 3, sec. 1816, Stats. 1911, was in force when the plaintiff was injured, although it was not at the time of the trial. Under this statute it was the duty of the court to submit a special verdict in cases falling within it. Counsel makes the claim that he assumed that the case would be submitted on a special verdict under the statute as it stood in 1911, and that he did not make a timely demand because he was misled. In the interest of fairness it would have been entirely proper to have granted the belated request. The matter was one which rested in the sound discretion of the trial judge, and we cannot say that he abused his discretion.

The complaint alleged, as one of the grounds of negligence relied on, that the movement of the engines which resulted in plaintiff's injury was made in violation of the rules of the company. Among the rules offered in evidence was one known as "rule 1063," which is as follows:

"Do not run an engine in the absence of the engine man without instructions from the master mechanic, unless in some emergency they are instructed to do so by the conductor or some officer in authority."

On the trial the defendant in substance admitted that this rule had been violated, but insisted that it was not liable, because the fireman in attempting to run the engine in the absence of the engineer was acting outside of the scope of his authority and was practically a trespasser and defendant was not liable for negligent acts done in this way. The respondent then introduced a lot of testimony tending to show that "rule 1063" had been abrogated because of long continued practice to the contrary and acquiescence in such practice by the defendant. This testimony was objected to because it injected a new issue into the case and one that was directly contrary to one of the allegations of the complaint. The objection was overruled and the evidence was admitted and subsequently the complaint was ordered amended by the court so as to expressly allege that the rule had been abrogated. These rulings are complained of. No affidavit of surprise was made, and we think the matters complained of rested in the discretion of the court. It would have been a more orderly proceeding to have amended the complaint first and then offered the evidence, but we do not see how the failure to pursue the regular practice in the instant case did any harm. The error, if there was one, was immaterial for reasons that will hereafter be stated.

Coming to the merits of the case, it appears to us that there was very little evidence that the plaintiff was guilty of contributory negligence, and that negligence on the part of the defendant was so clearly established that there was no question to be submitted to the jury in reference to it.

If we admit defendant's contentions that rule 1063 was not abrogated and that the fireman, Krueger, was acting outside the scope of his authority, we see no escape from the conclusion that engineer Mollitor was negligent in directing the fireman as he did and in failing to operate the engine himself. He was not only violating rule 1063, but also another rule of like tenor which applied specifically to engineers. The fire-

man was more or less under his control and could at least plead the excuse that he was acting under orders from his immediate superior. The engineer had no such excuse to offer, and the allegations of the complaint were broad enough to admit proof of negligence on his part.

But we think the fireman was not acting without the scope of his authority so as to exempt the employer from liability for his acts. It was his duty to be on the engine to assist in running it, keeping a lookout, ringing the bell, and firing. In doing what he did he was attempting to further his master's business. The movement was a proper one if made in a proper manner. The fireman was simply attempting to do too much in endeavoring to perform his own legitimate duties and those of the engineer as well. In attempting to carry the extra load he was doing what he had been forbidden to do, assuming that the rule was in force, and probably what he should not have done if the rule had been abrogated. It seems pretty obvious that two men should have been on this engine while the movement was being made, in order to keep a proper lookout.

Counsel for defendant conceded on the argument that under the rule of the *Daley Case,* 145 Wis. 249, 129 N. W. 1062, the fireman was not acting outside the scope of his authority to the extent that defendant was not liable for his negligence, but insists that this was an extreme case not properly decided and should not be followed. In the *Daley Case* the baggageman threw a tramp, who was stealing a ride, off a car while in motion. It was his duty to take him into the smoking car and introduce him to the conductor, whose business it was to remove the tramp at some proper place. It was held that inasmuch as the employee had a duty to perform in reference to the tramp, the fact that he proceeded to do it in an unlawful and unauthorized way did not relieve the master from liability. This principle is pretty well established in our decisions and elsewhere. It was recognized in *Wilson v.*

Noonan, 27 Wis. 598, where a person employed to make a translation made an incorrect one which was libelous, and the employer was held liable. *Bergman v. Hendrickson,* 106 Wis. 434, 82 N. W. 304, goes as far as the *Daley Case.* There the proprietor of a saloon was held liable for an assault committed by a bartender in an attempt to make a customer pay for drinks which he ordered. The bartender had the right to collect, but not to use such militant methods in doing so. *Johnston v. C., St. P., M. & O. R. Co.* 130 Wis. 492, 110 N. W. 424, and *Schultz v. La Crosse City R. Co.* 133 Wis. 420, 113 N. W. 658, are within the same principle. In each of these cases the employee had a duty to perform in the matter of protecting the property of the employer, and in each the servant proceeded in an unlawful and unauthorized manner, and the employer was held responsible. The *Daley Case* is also approved in *Zabawa v. Oberbeck Bros. Mfg. Co.* 146 Wis. 621, 624, 131 N. W. 826.

Many foreign cases hold that the real test is whether the act causing the injury was done in furtherance of the master's business. *Jackson v. C., R. I. & P. R. Co.* 178 Fed. 432, 435, and cases cited. Other cases upholding the rule of the cases cited, but phrasing it a little differently in some instances, are *Pierce v. N. C. R. Co.* 124 N. C. 83, 32 S. E. 399; *Haehl v. Wabash R. Co.* 119 Mo. 325, 24 S. W. 737; *Clancy v. Barker,* 131 Fed. 161 and cases cited; *Texas & P. R. Co. v. Hayden,* 6 Tex. Civ. App. 745, 26 S. W. 331.

It seems pretty clear that the fireman was where he had the right to be, that he was performing a service which it was his duty to assist the engineer in performing, and that he was furthering the business of his employer in doing what he did, and that under the decisions of our court and of others as well he was not acting outside of the scope of his employment because he attempted to do too much.

If rule 1063 had been abrogated, then it might be said that the fireman had the right to operate the engine alone, al-

though this is doubtful. But, conceding that the right existed, it is obvious that he was negligent in running the engine he was driving into the one from which plaintiff was alighting and which had been brought to a standstill in front of the station. So we think negligence was established on any theory of the case.

Had the pleadings been properly framed and the jury correctly instructed, the substantial question in this case, and, as we view it, about the only one, would have been the amount of damages which plaintiff was entitled to recover. The questions arising on the pleadings have already been treated. At the request of defendant's counsel the court gave a series of instructions which it is claimed took from the jury any question of defendant's negligence and in fact amounted to a direction of a verdict for defendant, which direction the jury declined to follow. It is argued that the verdict should have been set aside as perverse because of such conduct on the part of the jury. As further indicating passion and prejudice, it is said that the verdict is grossly excessive and should have been set aside for this reason.

The court charged the jury as follows:

"Now I instruct you when fireman Krueger was operating engine 1071, if such operating by him was a violation of the rules of the company, then I charge you that he was not, in so operating said engine, acting within the scope of his employment, and the defendant is not liable for the injury to the plaintiff. I charge you as a matter of law that at the time of the accident which resulted in plaintiff's injuries, fireman Krueger was operating engine 1071 in violation of the rules of the defendant. It is claimed by the plaintiff that the rule of the defendant company which prohibits the fireman from operating an engine in the absence of the engineer under certain circumstances stated therein was abrogated. It is claimed that such abrogation resulted from the custom or practice in conflict with such rule. Abrogation means doing away with, rescission or annulment. A rule cannot be deemed to be abrogated without the consent of the authority

making the rule. Therefore I charge you that a customary violation of a rule does not establish the abrogation thereof, unless such violation was with the acquiescence of the party making the rule under such circumstances that you may infer a consent to the abrogation thereof. Proof of repeated violations of a rule, which are secret and without the knowledge of the party making the rule, does not establish abrogation. I charge you as a matter of law that it appears without dispute in this case that the violations of rule 1063 (with the exception of one instance) were secret and unknown to the defendant. Under these circumstances the single isolated violation in the presence of Assistant Superintendent Armstrong is not sufficient to establish an abrogation. Rule 1063 is a highly beneficial rule tending to protect the safety of employees, property of the company, and passengers traveling on the road or right of way, to the persons lawfully on the premises of the company or on the highway, and you should not on slight evidence conclude that there has been an abrogation thereof. In order to find an abrogation, you should be satisfied to a reasonable certainty that violations thereof were either known to the defendant or were so general that they should have been known, and that the defendant consented to the annulment and doing away with the rule."

The court further instructed the jury as follows:

"Under rule 1063 the engineer under no circumstances had the power, right, or authority to direct the fireman to run the engine in his absence. If the engineer was disabled or emergencies arose so he could not run it himself, it was his duty to report either to the conductor or master mechanic or other officer, and then the fireman should not run the engine except with the consent of such superior officer.

"If fireman Krueger in running the engine in the absence of the engineer was acting outside of the scope of his employment, then he was the same as a trespasser, and he ceased to be a servant or employee of the defendant."

"In determining whether or not fireman Krueger, in running the engine in the absence of the engineer, was acting within the scope of his employment and properly within the rules of the company, you should determine whether an

emergency had arisen within such rule. Even if the conductor did consent to his running the engine, he was authorized to do so only when an emergency had arisen. The mere fact that the engineer was cold and that it might have been inconvenient because of so being cold for him to run the engine would not constitute an emergency under the rule. If, notwithstanding his condition, he could have safely run the engine in the short movement required, then you should find that there was no such emergency existed as is required by the rule."

The court in substance charged that the train conductor was not negligent.

In passing upon the motion for a new trial the court was of the opinion that under the charge the jury might have found that rule 1063 had been abrogated and that the fireman was negligent while acting within the scope of his authority and also that the engineer was negligent.

It seems improbable that the jury understood from this charge that they were at liberty to find that the rule had been abrogated. It is true they were told that in order to find abrogation they must be satisfied that the violations of the rules were known to the defendant or were so general that they should have been known and that the defendant consented to the annulment of the rule. But in a preceding part of the charge they were advised in effect that the evidence which was in fact offered to show abrogation was insufficient to do so. The negligence of the engineer was not withdrawn from the jury, but no reference was made to it in the charge, and in charging on comparative negligence, that of the plaintiff, if any, was compared with that of the fireman, Krueger. We are in the dark as to how the jury disposed of the question of negligence. Except as bearing on the matter of perversity the question is unimportant.

There was perhaps scant room for finding negligence under the charge. It was clearly proven, and, inasmuch as a verdict was not directed, the jury had the right to assume that

there was something left for them to pass upon and that the question of defendant's negligence was submitted in some form. Under these facts we do not think it should be said that the jury was governed by prejudice and passion because it found the defendant negligent.

The authorities are divided on the question whether a verdict contrary to an erroneous instruction is necessarily perverse. It is true the jury is supposed to accept the law from the court in most cases. In *Bearrs v. Sherman,* 56 Wis. 55, 62, 13 N. W. 869, it is held:

"Whether a verdict should be set aside when in conflict with the instructions of the judge, even where such instructions are not good law, must rest mainly in the discretion of the trial judge."

In *Parkes v. Lindenmann,* 148 Wis. 89, 90, 133 N. W. 580, a perverse verdict is defined as "one rendered in disregard of the law as given to the jury by the court." This is a terse definition of the term "perverse verdict," but one which is not calculated to fit into all situations. The decision in the *Parkes Case* makes no reference to the effect of disregarding erroneous instructions, and was hardly intended to modify the rule of *Bearrs v. Sherman, supra,* else the case would have been expressly mentioned.

The weight of authority outside of Wisconsin is to the effect that a verdict which is contrary to an erroneous instruction is not perverse. *O'Neill v. Thomas Day Co.* 152 Cal. 357, 92 Pac. 856, 858; *Pitts v. Thrower,* 30 Ga. 212; *Tilman v. Stringer,* 26 Ga. 171, 176; *Luken v. L. S. & M. S. R. Co.* 248 Ill. 377, 94 N. E. 175, 180; *Leidigh v. Keever,* 5 Neb. 207 (Unof.) 97 N. W. 801, 802; *Butler v. Rhode Island Co.* (R. I.) 68 Atl. 425, 426; *Pritchard v. Myers,* 11 S. & M. (Miss.) 169, 178; *Eastland v. Maney,* 36 Tex. Civ. App. 147, 81 S. W. 574, 575; *Armstrong's Adm'r v. Keith,* 3 J. J. Marsh. (26 Ky.) 153, 20 Am. Dec. 131; *Watts v. N. & W. R. Co.* 39 W. Va. 196, 19 S. E. 521, 527; *Homuth v. Metro-*

politan St. R. Co. 129 Mo. 629, 31 S. W. 903, 906; *Whitney v. Brown,* 75 Kan. 678, 90 Pac. 277; *Alsop v. Magill,* 4 Day (Conn.) 42, 45; *State ex rel. Foust v. Stafford,* 70 N. C. 115.

We see no reason for departing from the rule of *Bearrs v. Sherman.* The court in the instant case refused to set aside the verdict as perverse. It is true the court was of the opinion that defendant's negligence was submitted to the jury, but the opinion was also entertained that it would be an abuse of discretion to set the verdict aside in this case, although the jury might have acted contrary to the erroneous instructions, because a new trial would produce a like result. This court declines to hold that the verdict was perverse because contrary to instructions given.

Appellant finally contends that the damages assessed are outrageously excessive. The principal injury was an oblique fracture of the left femur from three to six inches above the knee, and the jury awarded $13,000 damages. It would seem at first blush as though any such allowance for a broken leg was clearly excessive, and yet it is seldom that we find more satisfactory evidence to sustain what might be considered a large verdict than in the instant case. The jury had a right to believe the credible evidence offered by plaintiff. That showed or tended to show that he was earning substantially $1,800 a year as a locomotive engineer; that his expectancy in life at the time of his injury was twenty-nine years, during which time he would be capable of earning $52,000; that the present worth of this earning capacity, computed on a five per cent. basis, was about $24,000; that plaintiff had undergone much pain and suffering on account of his injury and was still suffering pain and that such condition was likely to exist for some time, if not indefinitely; that he was totally incapacitated for work up to the time of the trial and his wages during this interim would amount to about $3,000; that the injury left his leg in such a condition that

he will never be able to resume his work as locomotive engineer; that his leg, as a result of the injury, is short, crooked, and weak, and the motion of the knee joint is only about half of what it was before the injury.

There is little doubt that unusually bad results flowed from the injuries received in this case, the most serious, although not the only one, being the broken leg. There was some evidence at least tending to show that at least a part of the trouble could be removed by an operation, but again the doctors disagree on the advisability of an operation. If it be conceded that the plaintiff's condition is such that he is permanently precluded from following his vocation of locomotive engineer, it cannot be said that the verdict is excessive. He had a long expectancy in life and was earning large wages. If he is obliged to quit the occupation for which he fitted himself, the extent of his capacity for earning in some other field of activity is problematical. A jury might well say that his earning power was decreased forty or fifty per cent., and, if so, the verdict was not excessive. The substantial doubt on the excessiveness of the verdict arises on the question of the permanent incapacity of the plaintiff to run a locomotive. What this court might think about it as an original proposition is immaterial. The jury has found the fact to be that such incapacity exists and will be permanent, and there is sufficient evidence to sustain the finding; so we cannot disturb it.

By the Court.—Judgment affirmed.

MARSHALL, J., dissents upon the ground that recovery is excessive.

A motion for a rehearing was denied, without costs, on October 5, 1915.

ROSENTHAL, Appellant, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Respondent.

September 14—October 5, 1915.

Carriers: Misrouting of freight: Liability as insurer: Acceptance at destination: Subsequent injury.

1. If a common carrier contracts to carry freight by a specified route and sends the freight by another route it becomes liable as an insurer for any injury which may result by reason of its unauthorized act.
2. Where a railway company which had contracted to carry horses to Chicago by one route sent them by another, but upon their arrival at Chicago they were accepted and taken charge of by the shipper's agents, who, although they might have placed them in other barns in the vicinity, put them in the stockyards barns where they became infected with stockyards fever, the company was not responsible for the damage resulting from such infection, although it was the shipper's intention (not disclosed to the railway company) that the horses should not go through to Chicago but should be stopped in transit and kept at an intermediate station on the route agreed upon, at which station, by the terms of the contract, there was to be a "stop to feed and water."

APPEAL from a judgment of the circuit court for Columbia county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

Action to recover damages resulting from the alleged misrouting of a carload of horses shipped from Brookings, South Dakota, to the Union Stockyards at Chicago. The facts were substantially as follows: The plaintiff, a horse dealer residing at Lodi, Wisconsin, purchased a carload of horses at Brookings, South Dakota, through his agents, Lohman & Samis, who lived in that vicinity. The agents loaded the horses, twenty-one in number, at Brookings, February 23, 1912, and entered into a written contract of carriage by which the railway company agreed to transport the carload to Chicago "to be delivered to Ed. Samis at Union Stockyards, Chicago station." At request of Lohman & Samis

the defendant's agent at Brookings inserted in the contract the words, "Stop to feed and water at Lodi, Wis." In this contract Lohman & Samis were named as consignors and Ed. Samis as consignee. No notice was given to the defendant that plaintiff owned the horses or was interested in them. Plaintiff did not intend to let the horses go to Chicago, but he directed his agents to have them shipped to Chicago in order that they might travel on a through train which would go faster than the local train by which they would be hauled if they were billed to Lodi. He intended to stop the horses in transit at Lodi and take the horses to his barns, and for this purpose directed his agents to procure the insertion in the contract of the direction to stop for feed and water at Lodi. This purpose was unknown to the defendant. No bill of lading appears to have been made out, and the defendant's agent neglected to insert the direction to stop at Lodi in the waybill. Under defendant's tariff and routing instructions filed with the interstate commerce commission, freight billed to Chicago from Brookings and paying through tariff rates was to be routed *via* Clinton, Belle Plaine, Mason City, and Sanborn, and would not pass through Lodi, and the carload of horses went by this route, although the defendant had a route to Chicago through Winona and Lodi. Plaintiff expected the car to arrive at Lodi by a through freight train which passed through that station late Saturday night, but the car did not come and he at once telegraphed to the superintendent of the Winona division, and after considerable telegraphing it was ascertained that the shipment had gone by way of Clinton, whereupon plaintiff notified Samis of the fact, and Samis on Sunday morning, February 25th, started for Chicago to meet the shipment and at the same time telegraphed to Ellsworth & McNair, a commission firm in Chicago, to take care of the horses until he arrived. Samis arrived in Chicago on Monday morning and testifies that he found the horses in the stockyards barn

and that Ellsworth & McNair had just started to take care of them. There were other barns in the vicinity in which they could have been placed. Samis took care of them until evening in the stockyards barn and then had them shipped to the plaintiff at Lodi. The plaintiff put part of them in his own barn and part in a neighbor's barn. They all fell sick after a few days with "stockyards fever," two died, and the disease was communicated to other horses, causing one more death.

By special verdict the jury found (1) that the horses became infected with the fever in the Chicago stockyards; (2) that the failure to ship by way of Lodi was the proximate cause of the death of the two horses of the original shipment; (3) that no want of ordinary care on the part of the plaintiff or his agents proximately contributed to produce the fever in said two horses; (4) that the damages sustained by the death of said two horses amounted to $398; (5) that the failure to ship by way of Lodi was the proximate cause of a part of the other horses in the shipment becoming infected with the fever; (6) that no want of ordinary care on the part of plaintiff or his agents proximately contributed to produce said fever in said last named horses; (7) that plaintiff's damages by reason of the infection of said last named horses were $639.45; (8) that the failure to ship by way of Lodi was the proximate cause of the infection of plaintiff's other horses not contained in the shipment; (9) that no want of ordinary care on plaintiff's part contributed to produce said fever in the last named horses; (10) that plaintiff's damages by reason of the infection of the last named horses were $500; and (11) that Lohman & Samis acted as plaintiff's agents in the purchase of the horses. The trial court directed that the plaintiff have judgment for nominal damages and that the defendant have judgment for costs, and the plaintiff appeals.

For the appellant there were briefs by *Grotophorst, Evans & Thomas,* and oral argument by *Evan A. Evans.*

Edward M. Smart, for the respondent.

WINSLOW, C. J. For the purposes of this case it will be assumed that the direction on the stock contract, "Stop to feed and water at Lodi, Wis.," amounted to a routing of the car by way of Winona and Lodi. This proposition is not decided, however, and may be somewhat doubtful. *Edwards v. Am. Exp. Co.* 109 Me. 444, 84 Atl. 987, 42 L. R. A. N. S. 705.

This court has certainly adopted the doctrine that if a common carrier contracts to carry freight by a specified route and sends the goods by another route it becomes liable as an insurer for any injury which may result by reason of its unauthorized act. *Seavey Co. v. Union T. Co.* 106 Wis. 394, 82 N. W. 285.

The trial judge concluded, however, that inasmuch as it appeared without dispute that the cause of the disease was the putting of the horses in the stockyards barn, there could be no recovery by the plaintiff because this was done by the agents of the plaintiff, *i. e.* Ellsworth & McNair, who took charge of the horses by direction of Samis and put them in the stockyards barn when they might, had they been so directed, have placed them in other barns in the vicinity. It appears that both plaintiff and Samis knew of the danger of contracting stockyards fever in the Chicago yards. We see no flaw in the reasoning. It is suggested that the evidence does not show conclusively that Ellsworth & McNair took the horses from the cars and placed them in the barn. The circuit judge deemed this fact clearly proven, and after examining the evidence we are of opinion that his conclusion in this regard was correct. It follows that the horses were accepted by the plaintiff through his agents on their arrival at

their destination and that they contracted the disease after such acceptance while in the possession of the plaintiff's agents and by reason of the acts of such agents.

The imperfect performance of the contract had thus been accepted by the plaintiff and the contract relations closed. The defendant cannot in justice be held responsible for what happened afterwards.

It is more than probable that there are other reasons which would prevent the plaintiff's recovery, but inasmuch as the foregoing is sufficient and is deemed unassailable it will not be necessary to consider them.

The plaintiff's misfortune is serious, but it is largely due to lack of candor, not to say deception, practiced by his agent, Samis, at the time the stock contract was made. It is very evident that Samis, by plaintiff's direction, attempted to obtain an advantage in the transportation of the horses for which he had neither contracted nor paid. Such methods are hardly to be approved even in dealing with a railroad company, and they make no appeal to one's sense of justice.

By the Court.—Judgment affirmed.

BRUSTMAN, Appellant, vs. DUNN and wife, Respondents.

September 15—October 5, 1915.

Vendor and purchaser of land: Fraudulent representation: Statement of fact or opinion? Waiver of fraud: Estoppel: Foreclosure of mortgages: Costs: Discretion.

1. The fact that an alleged fraudulent representation was in the form of an expression of opinion is not always conclusive; and when there is doubt as to whether it is made as a mere expression of opinion or a statement of fact the question must be determined by the court or jury.
2. Representations by the vendor of a farm that the pasturage was sufficient for twenty-five head of cattle, that the hay land grew

hay sufficient to enable twenty-five head of cattle to be kept, and that there was a cranberry marsh on the land producing ten to twelve bushels of cranberries each year, were, on the evidence in this case, properly *held* statements of fact.

3. Mere requests by the makers, refused by the payee, for an extension of time on notes, where the makers did not intend thereby to waive their claim for fraud in respect to lands for the price of which the notes were given, and where the payee did not understand there was any waiver, did not amount to a waiver or estop the makers from insisting upon their cause of action for fraud.

4. In an action to foreclose a mortgage, wherein a counterclaim on the ground of fraud in the sale of the land to the mortgagor was allowed, the denial of costs to the plaintiff, including the stipulated attorney's fee, is *held* not to have been an abuse of discretion.

APPEAL from a judgment of the circuit court for Marquette county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

This action grew out of an exchange of properties. The plaintiff conveyed to the defendants a farm and some personal property thereon and received in exchange property in the village of Montello valued at $1,200. In the trade the farm was valued at $3,300 and the personal property at $725. The defendants paid $25 on the personal property and gave a chattel mortgage for the balance, $700; also assumed a mortgage of $1,100 on the farm conveyed, and also gave a mortgage on it for $1,000 to secure the balance due under the agreement.

Action was brought by the plaintiff to foreclose the $1,000 real-estate mortgage. Defendants set up a counterclaim based upon alleged fraud. The court below found as follows:

"(1) That the plaintiff is the owner and holder of a certain note and mortgage in terms as in the complaint alleged, and that at the time of trial there was due and owing on said note by the terms thereof, disregarding the counterclaim of the defendant, the sum of $1,059.80; that a *lis pendens* in due form was duly filed in the office of the register of deeds

of Marquette county more than twenty days prior to the time of trial; and that the premises mortgaged consist of a farm and are used as such, and that it would be to the best interest of all the parties to sell them as a whole in case of sale pursuant to judgment of foreclosure.

"(2) That said note was given as part consideration for an exchange of properties between the parties. That in said exchange a dwelling house of the defendants of the value of $1,000 was conveyed by defendants to plaintiff, and passed in the deal at an agreed consideration of $1,200. That in said deal the mortgaged premises were conveyed to the defendant *Thomas L. Dunn* by the plaintiff, and were passed to him at an agreed consideration of $3,300, and that the same were worth not to exceed $2,400.

"(3) That to induce said trade the plaintiff, knowing the representations and each of them to be false, represented to the defendant *Dunn,* in substance, that the pasture on said farm grew pasturage sufficient for twenty-five head of cattle; that the marsh hay land on the farm grew hay sufficient to enable twenty-five head of cattle to be kept on the farm, with the other produce thereof; that the hay marsh was a dry marsh and could be cut with a mower without using 'clogs' on the horses; and that there was a cranberry marsh on the land that was producing ten to twelve bushels of cranberries each year; whereas said pasture and hay land were capable of growing feed for not to exceed twelve head of cattle and there was not part of the marsh on said premises producing cranberries.

"(4) That at the time the said representations were first made, and from thence until after the deal was consummated, the said hay and pasture lands were covered with water from the rains and melting snows of spring and it was not possible to go over the same or make examination of the surface or vegetation thereof. That the defendant *Dunn* went over the upland of said farm and examined the same, and had full opportunity to judge as to the nature of the soil thereof. But as to the lowlands the defendant had no such opportunity on account of their being flooded as aforesaid.

"(5) That the said representations as to said pasture and hay and cranberry land were not made as mere expressions of opinion, but were made as statements of fact, with the in-

tention that they be relied on as such. That the defendants believed the said representations and relied thereon and were induced thereby to make said trade and did not learn of their falsity until some time after they had moved onto said farm.

"(6) That had said representations been true the said farm would have been worth the full amount that it passed at, viz. $3,300, and that by the said fraud of the plaintiff in making said representations the defendant *Dunn* was damaged in the sum of $700.

"(7) That at the time the said exchange was made the defendant *Dunn* purchased of the plaintiff the stock and personal property thereon for the sum of $725, $25 of which was paid at the time and the remainder thereof was to be paid some time later. That on the $700 coming due the defendant asked for further time in which to pay it, but the plaintiff did not agree to grant nor did he grant any extension of time. That subsequently the defendant *Dunn* paid said note. That by asking further time and by paying said note as aforesaid, or either thereof, the defendant did not intend to waive his claim for fraud in respect to said land or his damages sustained in that respect, nor did the plaintiff understand that the defendant intended thereby to waive such claim or damages.

"(8) That the plaintiff demanded payment of said $1,000 note when the same became due and the defendant asked for an extension of time for one year thereon, which request plaintiff refused; and the defendant also offered to give further security for the payment of said note if extension was granted as requested; and the defendant also requested the holder of the first mortgage on said land to loan him money with which to pay said note. But the defendant did not intend thereby to waive his claim for damages for said fraud, nor did he understand that by such requests and offers he was waiving such claim.

"(9) That at this date, December 3, 1914, there is due on the note in suit, after allowing credit thereon for the amount of the failure of consideration caused by fraud found, the sum of $317.35."

The court concluded: (1) "That the defendant *Dunn* did not affirm his original promise to pay said note or waive his

action for fraudulent representations and is entitled to have the sum of $700, his damages as found, applied on said note as part payment thereof as of the date thereof, and the plaintiff is entitled to recover of the defendant *Dunn,* and to have foreclosure of his said mortgage to enforce such payment of the amount due after such credit. (2) That neither side should recover costs of the other. Let judgment be entered accordingly."

Judgment was entered accordingly, from which this appeal was taken.

For the appellant there was a brief by *Metzler & Metzler,* attorneys, and *Grady, Farnsworth & Kenney,* of counsel, and oral argument by *Walter Farnsworth.*

For the respondents there was a brief by *D. W. McNamara,* and oral argument by *Mr. McNamara* and *Mr. N. L. Baker.*

Kerwin, J. The real controversy here under the assignment of errors is that the findings are not supported by the evidence and that the court erred in denying costs, including attorney's fees stipulated in the mortgage. The learned trial judge in a written decision held that the allegations of the counterclaim were well supported by the evidence, and from a careful examination of the record we are convinced that such conclusions are correct.

Contention is made by counsel for appellant that the representations were mere matter of opinion. The court below held, and we think correctly, that they were statements of fact fraudulently made with intent to deceive, which were relied upon by the defendants.

This court held in *J. H. Clark Co. v. Rice,* 127 Wis. 451, 106 N. W. 231, that the fact that a statement takes the form of an expression of opinion is not always conclusive. When there is doubt as to whether it is made as mere expression of opinion or a statement of fact the question must be determined by the court or jury.

It is contended by counsel for appellant that because the defendants asked extension of time of payment of the notes, which extensions were refused, the defendants waived the fraud, and that such requests and subsequent payment of the $700 note amounted to a waiver. The court below held that such acts on the part of the defendants did not amount to a waiver and that there was no intention on the part of defendants to waive their claim for damages on account of the fraud, nor did it estop the defendants from insisting upon their cause of action for fraud.

It is clear from the evidence that the findings to the effect that there was no intention to waive the fraud are well supported, and it is also clear upon the established facts and the law that the mere requests to extend time on the notes which were refused did not amount to an estoppel or waiver of the cause of action for fraud. *Jacobsen v. Whitely,* 138 Wis. 434, 120 N. W. 285.

Claim is also made by appellant that he should have been allowed costs including the stipulated solicitor's fee. The question of costs was within the discretion of the court and there was no abuse of discretion in denying costs. *Spengler v. Hahn,* 95 Wis. 472, 70 N. W. 466.

By the Court.—Judgment affirmed.

LOOMANS LUMBER COMPANY, Appellant, and others, Respondents, vs. MIELKE and others, Respondents.

September 15—October 5, 1915.

***Mechanics' liens: Subcontractors: Payment of fund into court: Priority: Distribution* pro rata.**

Nothing having been due from a school district to the principal contractor for a school house when subcontractors brought their several actions under sec. 3328, Stats., but, after consolidation of the actions, the district having paid into court a sum then

admitted to be due and to which neither the district nor the principal contractor made any claim, a distribution of such sum *pro rata* among the plaintiffs was properly adjudged without priority according to the time of the commencement of the several actions.

Appeal from a judgment of the circuit court for Fond du Lac county: Chester A. Fowler, Circuit Judge. *Affirmed.*

C. E. Hooker, for the appellant.

For the respondents *Mielke* and *Douglas* there was a brief by *C. G. Cannon;* for the respondents *Kaukauna Lumber & Manufacturing Company* and *Pindle-Jackson Company* a brief by *Julius P. Frank,* attorney, and *Ryan, Cary & Frank,* of counsel; for the respondent *J. F. Ege* a brief by *N. P. Christensen;* for the respondent *Warning Sheet Metal Company* a brief by *Williams & Williams;* and the cause was argued orally by *N. L. Baker.*

Timlin, J. The appellant and seven others, respondents herein, all subcontractors or materialmen, began suits under sec. 3328, Stats., against the school district and a principal contractor. These suits were commenced on and between the 10th day of January, 1913, and the 12th day of March, 1913. One of the respondents, *Warning Sheet Metal Company,* began a second suit on the same demand on the 2d day of September, 1914. These actions were then consolidated. The principal contractor had defaulted and the district had lawfully taken over the contract for the purpose of completing it at the expense of the principal contractor. Under such circumstances it was not known and could not be ascertained definitely what sum, if anything, would become due the principal contractor. In December, 1914, the principal contractor and the school district entered into a stipulation to the effect that there was then due the principal contractor $4,000, which the school district paid into court, "to be paid

to the proper person or persons legally entitled to have and receive the same as authorized and warranted by the facts, circumstances, and proofs in this action, as provided by the statutes of Wisconsin and law and as ordered and directed by the order and judgment of the court." The school district was discharged from further liability in the case, in analogy to a case of interpleader. The circuit court found on sufficient evidence, hence it must be assumed as a verity here, that at the time of the commencement of each of the several actions above noted there was nothing due from the school district to the principal defendant. A case, therefore, is presented in which each of the claimants in the consolidated action had begun his suit prematurely and was not entitled to recovery or priority, but a fund was paid into court on a date certain when all said actions were pending and for the benefit of whomsoever might be entitled thereto, the school district and the principal contractor making no claim to such fund. It follows that the ruling of the circuit court in distributing this fund of $4,000 *pro rata* among said claimants was correct. There is nothing in such ruling which conflicts with *James v. Davidson,* 81 Wis. 321, 51 N. W. 565, or *Bank of Iron River v. School Directors,* 91 Wis. 596, 65 N. W. 368. In the former case subcontractors like the respondents here were held not entitled to question the right or priority of one who had received his money, while here the appellant becomes an actor and has no standing which enables it to question the right of the respondents to a *pro rata* distribution.

By the Court.—Judgment affirmed.

Harvie and others, Respondents, vs. Town of Caledonia, Appellant.

September 15—October 5, 1915.

Towns: When bound by election as to nature of controversy: Highways: Surface water: Rights of adjoining owners: Construction of dikes: Obstruction of highway: Ditch to drain highway: Damages: Benefits.

[1. Whether after a town had notified a landowner that in cutting a dike upon his land adjacent to a highway it was acting under sec. 1236, Stats., and after the town board had appointed appraisers to assess his damages under sec. 1237, and after the landowner had on appeal from their assessment recovered judgment for a larger sum, the town should on appeal from such judgment be held bound by its election to treat the controversy as one governed by said statutes, or might claim that they were inapplicable and that it was not liable for any damages,—is not determined.]

2. A town is not particularly favored in the law over a private proprietor in dealing with surface water, except that it has what is the equivalent of the right of condemnation.

3. At common law the upper proprietor had no easement or servitude in the land of the lower one which entitled him to an unobstructed discharge of surface water on the lower land. The lower proprietor might fight off the flow as best he could, and for that purpose had a right to construct a dike or embankment on his own land so as to keep the water off.

4. If, as an exception to the general rule, a dam or dike may not be built across a narrow valley or ravine where the result would be to submerge a considerable part of the land drained through such valley or ravine,—a point not decided,—the mere fact that land is hilly or that surface water from a considerable area may be drained at a certain place is not sufficient to bring a case within such exception.

5. The easement acquired by a town upon legally laying out a highway does not carry with it a right to the unobstructed flow of surface water over the adjacent lands, and the adjacent proprietors may, by dikes on their own land outside of the limits of the highway, keep back the surface water coming from the highway; and in so doing they do not violate the law as to obstruction of the highway.

6. Under secs. 1236, 1237, Stats., where a drain or ditch is constructed upon land adjoining a highway, damages are recoverable by the owner, but assessment or consideration of "special advantages" is provided for in sec. 1237 only in cases where material is actually taken from the land and placed on the road.

APPEAL from a judgment of the circuit court for Columbia county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

For many years the defendant town has maintained a highway running north and south over a low tract of land in said town, and plaintiffs are the owners of forty acres lying west of and adjacent to the highway. Off from the highway in plaintiffs' forty there is a small pond, the slope of the land being from the highway to the pond. Surface water from lands adjacent to the eastern side of the highway flowed onto the highway, and the town built a culvert across the road opposite plaintiffs' pond, thus letting the water onto their land. Plaintiffs then constructed a dike on their property next to the highway to protect it from the surface water. This caused the water to back up onto the land on the opposite side of the road, and the owner thereof in turn constructed a dike on his land at the place where the water from the highway came upon it. As a result the highway was submerged at times of melting snow and heavy rains, and the town authorities went upon plaintiffs' land and cut the dike, causing the water to flow onto their land and into the pond. Plaintiffs were about to repair the dike by filling up the opening, when they received notice from the town authorities that they were acting under sec. 1236, Stats., and would prosecute plaintiffs if they persisted in closing up the dike. Plaintiffs then applied to the town board to have damages assessed, and appraisers were appointed who proceeded to do their work, and their award was duly filed with the town clerk in accordance with sec. 1237, Stats. Being dissatisfied with the award made by the appraisers, plaintiffs appealed to the circuit court. The jury found in favor of

plaintiffs and assessed their damages at $777.50 and costs. From judgment entered in accordance with such verdict defendant appeals.

For the appellant there were briefs by *Rogers & Rogers,* attorneys, and *J. L. Mahoney,* of counsel, and oral argument by *Mr. H. B. Rogers* and *Mr. Mahoney.* They contended, *inter alia,* that the common-enemy rule as to surface water does not apply in a broken and hilly country. *Hoyt v. Hudson,* 27 Wis. 656, 664; *Ramsdale v. Foote,* 55 Wis. 561, 13 N. W. 557; *Waters v. Bay View,* 61 Wis. 642, 644, 21 N. W. 811; *Bowlsby v. Spear,* 31 N. J. Law, 351, 86 Am. Dec. 216; *Swett v. Cutts,* 50 N. H. 439, 9 Am. Rep. 276; *Quinn v. C., M. & St. P. R. Co.* 23 S. Dak. 126, 120 N. W. 884; Gould, Waters (3d ed.) § 275; 3 Farnham, Waters, secs. 877, 882, 889*b*, 889*c*, 889*f*; *Palmer v. Waddell,* 22 Kan. 352; *Gottenetroeter v. Kapplemann,* 83 Mo. App. 290; *Taylor v. Fickas,* 64 Ind. 167, 31 Am. Rep. 114; *Chicago, R. I. & P. R. Co. v. Shaw,* 63 Neb. 380, 88 N. W. 508; *Livingston v. McDonald,* 21 Iowa, 160, 89 Am. Dec. 563; *McClure v. Red Wing,* 28 Minn. 186, 9 N. W. 767; *Grand Junction C. Co. v. Shugar,* L. R. 6 Ch. App. Cas. 483; *Franklin v. Durgee,* 71 N. H. 186, 51 Atl. 911, 58 L. R. A. 112. Dedication or condemnation of land for highway purposes includes an easement for necessary drainage. When a road is legally laid out and constructed, no owner of adjoining land has a right, by embankment, to create an overflow of water upon the highway; otherwise a highway, instead of being a public benefit, would be a public nuisance, and compensation might be twice recovered for the same right. 1 Elliott, Roads & S. (3d ed.) § 259; *Schuss v. Chehalis,* 82 Wash. 595, 144 Pac. 916; *Myers v. Nelson,* 112 Cal. xvii, 44 Pac. 801; 2 Farnham, Waters, sec. 188*a*; *Bockoven v. Lincoln,* 13 S. Dak. 317, 83 N. W. 335; *Churchill v. Beethe,* 48 Neb. 87, 66 N. W. 992; *Tower v. Somerset,* 143 Mich. 195, 106 N. W. 874; 1 Elliott, Roads & S. (3d ed.) § 556; *Wend-*

landt v. Cavanaugh, 85 Wis. 256, 263, 55 N. W. 408; *Schuster v. Albrecht,* 98 Wis. 241, 244, 73 N. W. 990; *Champion v. Crandon,* 84 Wis. 405, 54 N. W. 775; *Clauson v. C. & N. W. R. Co.* 106 Wis. 308, 312, 82 N. W. 146; *Peck v. Baraboo,* 141 Wis. 48, 55, 122 N. W. 740.

For the respondents there was a brief by *Grotophorst, Evans & Thomas,* and oral argument by *Evan A. Evans.*

BARNES, J. After the defendant had cut the dike built by the plaintiffs it notified them that it was lawfully proceeding under sec. 1236, Stats., and that the cut should not be again filled up. The material part of sec. 1236 reads:

"It shall be lawful for any superintendent of highways or any person acting under his direction to enter upon any lands adjoining to or near any highway in his town or district and construct such drains or ditches as may be necessary for the improvement or preservation of such highways."

The plaintiffs then applied for appraisers to assess their damages, acting under sec. 1237, Stats. The material part of this section reads:

"If any owner or occupant of lands so entered upon or used for any of the purposes mentioned in the preceding section shall feel himself aggrieved he may apply to the supervisors of the town, who shall appoint three disinterested electors of such town to appraise the damages. . . . The appraisement of damages so made or the determination not to allow any shall be filed by the appraisers with the town clerk, to be laid before the town board of audit, within ten days after such oath is taken; and in default of such finding the town shall be liable to an action for damages as a trespasser."

Pursuant to this notice the town board appointed appraisers, who found that plaintiffs suffered no damages. Plaintiffs appealed from this award, as provided in sec. 1237*a*.

There is good reason for saying that the parties in effect agreed that the controversy was one which fairly fell within the provisions of the statutes referred to, and that they

should be bound by their election. As between private parties such would no doubt be an entirely proper rule to apply. If the acts of the town officers were *ultra vires,* however, there are many cases which hold that such acts would not be binding on the town, and inasmuch as it now claims that it was not liable to the plaintiffs for any damages whatever and could not lawfully obligate itself to pay any, we will proceed to discuss the points raised by the appellant on this appeal.

The appellant suggests that the rules of law applicable to surface water as between private parties do not apply to towns and that they have greater rights and privileges in dealing with such water than individuals have, aside from the right of condemnation. If such a distinction exists, it is confined within pretty narrow limits.

"The same principle which governs as between individuals [in dealing with surface water], holds good as between towns and villages and individual proprietors." *Pettigrew v. Evansville,* 25 Wis. 223, 231.

"Cities, towns, and villages, as owners of lands for highways and other purposes, have the same rights as private owners to repel or obstruct the flow of surface water collecting therein from snow and rain." *Champion v. Crandon,* 84 Wis. 405, 407, 54 N. W. 775; *Hoyt v. Hudson,* 27 Wis. 656, 658; *Waters v. Bay View,* 61 Wis. 642, 644, 21 N. W. 811.

"It has been declared to be the law of this state, in *Clauson v. C. & N. W. R. Co.* 106 Wis. 308, 82 N. W. 146, and in other cases there cited, that a municipal corporation, in the improvement of its streets, . . . has the same right to obstruct and divert the existing flow of mere surface water that an individual owner has in the improvement of his land." *Peck v. Baraboo,* 141 Wis. 48, 54, 55, 122 N. W. 740.

These cases, as well as others that might be cited, show pretty clearly that a town is not particularly favored in the law over a private proprietor in dealing with surface water, except that it has what is the equivalent of the right of condemnation.

At common law the upper proprietor had no easement or servitude in the land of the lower one which entitled him to an unobstructed discharge of surface water on the lower land. The lower proprietor might fight off the flow as best he could and for that purpose had a perfect right to construct a dike or embankment on his own land so as to keep the water off. *Hoyt v. Hudson, supra,* p. 659; *Pettigrew v. Evansville, supra,* p. 228; *Eulrich v. Richter,* 37 Wis. 226; *O'Connor v. F. du L., A. & P. R. Co.* 52 Wis. 526, 530, 9 N. W. 287; *Waters v. Bay View, supra; Lessard v. Stram,* 62 Wis. 112, 22 N. W. 284; *Clauson v. C. & N. W. R. Co., supra,* p. 310; *Peck v. Baraboo, supra,* p. 54.

It was conceded that the highway in question was legally laid out. The appellant argues that this concession establishes the fact that the west half of the right of way was secured from the plaintiffs or their predecessors in title by purchase or condemnation, and that in either event the acquisition of the easement carried with it the right to discharge surface water without molestation on the adjacent land, and that compensation for such right was necessarily included in the consideration paid for the easement. A number of cases are cited as sustaining this contention. They do not do so in fact, but deal with the dominion which a town may exercise over the particular strip of land acquired for road purposes.

The town, with certain limitations, had the right to discharge surface water on plaintiffs' land from its roadway. By virtue of such an act the plaintiffs suffered no legal wrong for which they could demand compensation in a condemnation proceeding. *Waters v. Bay View, supra; Champion v. Crandon, supra.* Railroad companies might exercise the same right without liability for compensation. *Hanlin v. C. & N. W. R. Co.* 61 Wis. 515, 21 N. W. 623; *Johnson v. C., St. P., M. & O. R. Co.* 80 Wis. 641, 644, 50 N. W. 771; *O'Connor v. F. du L., A. & P. R. Co.* 52 Wis. 526, 9 N. W. 287; *Clauson v. C. & N. W. R. Co.* 106 Wis. 308, 82 N. W.

to enter upon them and take stone, gravel, sand, etc., for use in improving the highway, and also to cut and remove wood and trees for a like purpose.

Sec. 1237 requires the appraisers to "take into consideration the special advantages, if any, as well as the damages done to said lands by reason of any improvement made on said road by such materials so taken." The assessment of special advantages seems to be confined to cases where material is actually taken from adjacent land and placed on the road. Damages are recoverable where a drain or ditch is cut upon adjoining land, but benefits are not provided for.

By the Court.—Judgment affirmed.

Timlin, J. I concur in the affirmance of this judgment, but I think it ought to be affirmed on the ground that secs. 1236, 1237, and 1237*a* of the Statutes by clear implication authorize the construction of drains or ditches on lands of abutting owners when necessary for the improvement or preservation of the highway, and recognize the right of the abutting owner to have damages therefor. This would make it unnecessary to determine the controverted question whether such damages are included in the award of damages made when the land was taken for highway purposes or in the release of damages which sometimes takes the place of the award. *Turner v. Dartmouth,* 13 Allen, 291; *Wakefield v. Newell,* 12 R. I. 75; *Chicago v. Taylor,* 125 U. S. 161, 8 Sup. Ct. 820; *Bockoven v. Lincoln,* 13 S. Dak. 317, 83 N. W. 335; 1 Elliott, Roads & S. (3d ed.) § 556 and cases cited. Because, if it is doubtful whether so included or not included, the legislature could and did give this right of recovery by supplemental condemnation proceedings. The alleged rule of the common law by which surface water is said to be a "common enemy" is not, I think, applicable to highways or railroads. These structures, after lawful acquisition of the land upon which they are built, necessitate em-

bankments across lower places where the surface water formerly flowed and cuts through the higher places on the surface. The proportion of level land is small. The general surface is wavy or undulating. The surface thus intercepted by embankment must be carried along in ditches parallel with the embankments or cuts until a possible point of discharge is reached. At this point, after being thus collected, it is necessarily discharged often from several different small watersheds and in a much increased volume. So culverts may be constructed across the embankment in the lower places and the proprietor or trustee of the road may be liable for damages for negligent failure to construct such culverts. He or it, therefore, cannot by such embankments dam up against surface water, and he or it can collect the surface water from several small watersheds and discharge it in increased volume on adjacent land of others. Even the construction of a culvert at the lowest point in a considerable watershed will collect the surface water in increased volume and discharge it upon the lower adjacent proprietor. The abutting owner cannot on his own land bank up this culvert and throw the water back on the highway. I remember a case in one of the Southern states where a criminal prosecution for doing so was sustained on common-law principles. So I think the "common enemy" references in the opinion are misleading. Besides, it seems to me about time to begin to straighten out this "common enemy" surface water tangle in this state. There never was any such common-law doctrine. I shall not attempt to collect authorities. Many of them will be found collected in 3 Farnham on Waters, secs. 889*b*, 889*c*, 889*d*, 889*e*, and 889*f*.

In the section first referred to it is said:

"There is no general right to fight surface water as a common enemy. All rightful acts with regard to it are confined within very narrow limits which have not yet been fully defined. And to state generally that such water is a

common enemy, or that there is a right to fight it at common law, cannot be otherwise than misleading."

The ancient and modern English view will be found in Halsbury's Laws of England, vol. 16, p. 113: "The common law imposes a duty upon occupiers of land adjoining a highway to clean and scour their ditches so as to prevent any nuisance to the highway," citing Bac. Abr. tit. Highway, D., and other authorities. See, also, *Peck v. Baraboo,* 141 Wis. 48, 122 N. W. 740. When this court in *Shaw v. Ward,* 131 Wis. 646 (see p. 647, par. 3), 111 N. W. 671, and in *Manteufel v. Wetzel,* 133 Wis. 619, 114 N. W. 91, ruled that the upper proprietor had a legal right to improve his land and rid it of surface water by ditching thereon in the direction of the former flow of surface water down to the adjoining land of the lower proprietor, who in turn possessed a like legal right, it necessarily decided that the lower proprietor could not dam up this ditch and set the same water back again on the lands of the upper proprietor. That is to say, this court necessarily so decided, unless we are to have the legal paradox, that, as between two private parties, one has a legal right to do a certain act and another has a legal right to prevent the former from doing the same act; or, what is equivalent, a legal right to frustrate the object and purpose of the exercise of the former legal right which his adversary, as the law says, possesses. If this is "the perfection of reason," then it is, according to Coke, fit to rank as common law; otherwise not.

I have no desire in this memorandum to do more than note my comments and arouse inquiry on the subject, for in this way law grows and finally perfects itself.

LANDS OF SYDOW.

September 15—October 5, 1915.

Homestead: Descent: Sale: Interest of widow, how limited: Ascertainment of present value.

1. The qualified life estate in the homestead which descends to the widow of an intestate who leaves issue cannot be changed to an absolute life estate by sale of the homestead. Her interest in the proceeds of the sale remains the same as in the land, namely, the right to the use thereof during widowhood.
2. The probable duration of widowhood not being determinable, the present value of a widow's homestead estate cannot be ascertained and awarded to her in gross.
3. The homestead in which the widow of an intestate leaving issue takes a life estate by descent is limited to the quantity and value prescribed in sec. 2983, Stats., the statutory definition of the term "homestead" being applicable, under sec. 2984*a*, as well to the descent of land as to exemptions.

APPEALS from a judgment of the circuit court for Columbia county: CHESTER A. FOWLER, Circuit Judge. *Modified and affirmed.*

September 22, 1912, Benno Sydow died intestate leaving a widow, *Frieda,* and a minor son, *Hugo.* His homestead of forty acres was of the value of $7,000. Proceedings for the sale of the son's and widow's interests therein, and of other lands, were duly had, and the court adjudged that the purchase price of the homestead, $7,000, be set aside and held in trust and the income thereof paid to *Frieda* so long as she remains a widow, and that upon her death or remarriage the trust fund shall become the property of *Hugo;* unless *Frieda* shall within twenty days elect to take the present value of her dower interest in the $7,000, in which event the sum of $4,666.67 of said proceeds shall be set aside and held as a trust fund and the income thereof paid to *Frieda* during her widowhood, and on the termination thereof the fund to become the absolute property of *Hugo.* Both *Frieda* and *Hugo* appealed from the judgment.

For the widow, *Frieda Sydow,* the cause was submitted on the briefs of *W. C. Leitsch,* attorney, and *H. E. Andrews,* of counsel.

E. E. Brossard, guardian *ad litem,* for *Hugo Sydow,* infant.

Vinje, J. The widow claims that upon the sale of the homestead she became entitled to an absolute life estate in the proceeds, and that the court erred in limiting her estate therein to their use only during her widowhood. The estate in the homestead that descends to the widow where the intestate leaves issue is of the quality of a life estate and differs from such estate only in that it may be terminated by remarriage as well as by death. Sub. (2), sec. 2271, Stats. 1913. It is a life estate on condition subsequent that she does not remarry. *Ferguson v. Mason,* 60 Wis. 377, 387, 19 N. W. 420. This qualified life estate cannot be changed to an absolute life estate by the sale of the homestead. The widow's interest in the proceeds thereof remains the same as in the land itself, namely, the right to the use thereof during widowhood. Were it otherwise, the provision of the statute that it shall terminate upon remarriage could always be nullified by a sale.

In the present case the widow is twenty-two years of age. Counsel on both sides as well as the trial court confess themselves unable to determine the probable duration of her widowhood, and therefore the present value of her homestead estate could not be ascertained and awarded to her in gross. To us also widowhood is an uncharted sea whose shores the future veils from sight. How long before her bark will reach a haven we cannot venture even a guess, though we are informed by the insurance department that in Europe there are tables determining the "expectancy" of widowhood at different ages, but that such tables are not in use in the United States. So the court properly held that

the widow was entitled to the use of the proceeds of the homestead, less her dower interest therein if she elects to receive that presently, during her widowhood, and that upon her remarriage or death the fund should become the property of her son.

Upon the appeal of the minor it is claimed that the homestead is limited to the quantity and value prescribed in sec. 2983, Stats. 1913, to wit, not in excess of forty acres in area of agricultural lands, one quarter of an acre of village or city lots, or in either case of $5,000 in value, and that the court erred in allowing the widow the use for widowhood of the whole purchase price of $7,000.

Before ch. 269, Laws 1901, now sec. 2984*a*, Stats., was enacted, the court in *Ford v. Ford,* 70 Wis. 19, 52, 33 N. W. 188, held that though the term "homestead" as used in the will was construed to mean more than a quarter of an acre, the property being city lots, yet since the widow elected not to take under the will but under the law, she thereby limited her homestead right to the statutory homestead of a quarter of an acre. The limitation of $5,000 in value did not then exist. Hence sec. 2984*a*, providing that "wherever the word 'homestead' is used in the Statutes of 1898 or in any law of this state or in this act, it shall be defined to be the estate or interest in the land as defined and set forth" in sec. 2983, Stats. 1913, was but a declaration of the rule announced in the *Ford Case.* The statutory definition of the term "homestead" applies as well to the descent of land as to exemptions. The widow, therefore, has a homestead right in only $5,000. If she elects to take her dower interest therein presently she can do so, as provided in the judgment entered. Its value at her age of twenty-two is $1,317.71. This amount she is entitled to presently if she so elects, and the balance of the $5,000, or $3,682.29, should be held as a trust fund the income of which should be paid her during her widowhood. If she does not elect to now

take her dower interest in the homestead she should have the use during her widowhood of the whole trust fund of $5,000. Of course her dower interest in the $2,000 which the homestead forty yielded in excess of the $5,000 should be paid the widow now, and the balance paid the minor.

It follows that the widow takes nothing upon her appeal, and that upon the appeal of the minor the judgment is modified in accordance with the opinion, and as so modified is affirmed with costs to the minor.

By the Court.—Ordered accordingly.

Coon, Appellant, vs. Metzler, Respondent.

September 15—October 5, 1915.

Duress: Threats of criminal prosecution: Payment of money after interval: District attorney: When should not be attorney in civil action.

1. To constitute duress a person must be so strongly influenced that his acts are not the result of his own will; but acts or threats which might fall short of duress under certain conditions might be ample under others, much depending on the situation of the parties, their relations to each other, physical and mental strength, and all the surrounding circumstances.
2. The mere fact that several days elapsed between the making of threats and the payment of money does not conclusively negative duress in such payment.
3. Threats of prosecution made by a district attorney differ materially from similar threats made by a layman or private attorney in that they bear the added weight of the power vested in that officer to institute, and to a certain extent control, criminal prosecutions.
4. Where in an action to recover money alleged to have been paid under duress there was evidence that plaintiff, an innocent man, who had been found in a somewhat compromising situation with a married woman, was repeatedly threatened by the district attorney with prosecution and conviction of adultery, and under the stress of such threats gave his note for $800 to settle the

matter, after which he went to a distant state, procured the money, and paid the note within twenty days, believing that the prosecution would proceed if he did not, it could not be said as matter of law that there was no duress in such payment, and a nonsuit was improper.

5. It is inadvisable, if not improper, for a district attorney to act as attorney to recover civil damages arising from a supposed criminal act.

BARNES, J., dissents.

APPEAL from a judgment of the circuit court for Marquette county: CHESTER A. FOWLER, Circuit Judge. *Reversed.*

This is an appeal from a judgment of nonsuit. The action was brought to recover money alleged to have been paid under duress of threatened criminal prosecution. The defendant claimed by his answer that the money was paid to settle a claim for civil damages. The evidence on the part of the plaintiff tended to show these facts: That the defendant at the time of the occurrences involved in the action was an attorney at law residing at Montello, Marquette county, and was the district attorney of said county (this is admitted); that the plaintiff in April, 1914, was a married man forty-seven years of age, residing in the village of Endeavor in said county, and was a buyer of stock and produce; that on Friday, April 3, 1914, he went to the house of a neighbor named Baker for the purpose of using Baker's telephone, and became engaged in conversation with Baker's wife; that while standing near Mrs. Baker, Mr. Baker came in the house and immediately accused plaintiff of having his arm around Mrs. Baker, which plaintiff denied; that on the following morning plaintiff started for Montana with a carload of stock which he had previously collected, on a train which left Endeavor at 4:30 o'clock a. m.; that Mrs. Baker was on the train and sat in the seat with the plaintiff, but left the train at Westfield, twelve miles from Endeavor; that on the same day Baker communicated with the defendant,

who immediately came to Endeavor and consulted with Baker concerning the supposed undue intimacy between plaintiff and Mrs. Baker, and was retained by Baker; that when plaintiff reached Stevens Point he had telephone conversations with his daughter and with one Churchill at Endeavor, who both advised him of defendant's visit to Endeavor and his consultation with Baker and advised plaintiff to return, and that it was understood that Baker and *Metzler* had papers made out for his arrest and to bring him back (there is, however, no evidence that either of these communications was authorized by or known to the defendant); that the plaintiff went on with his car of stock to St. Paul, and on the 6th of April started back and telegraphed the defendant to meet him at Portage on the arrival of the afternoon train; that *Metzler* and Baker went to Portage and met the plaintiff; that they all went to the law office of defendant's brother in Portage, where plaintiff and *Metzler* went into a private room and had a conversation; that *Metzler* accused him of adultery with Mrs. Baker and stated that he could prove it by Mrs. Baker, who would swear to anything he wanted; that defendant threatened to commence a criminal action therefor and send the plaintiff over the road if he didn't settle up, and told him that a thousand dollars would settle it; that he refused to pay that sum and offered $500; that after more talk and threats of criminal prosecution *Metzler* agreed to take $800, and finally plaintiff signed a note payable in fifteen days for $800; that *Metzler* repeatedly said that if the note was not paid when due he would go ahead with the criminal prosecution and send the plaintiff over the road; that plaintiff was nervous, excited, and "pretty well scared" by these threats; that he finally signed a note due in fifteen days for $800 payable to the defendant and promised to pay it as soon as he sold his cattle; that he took a receipt signed by Baker (the condition of the record seems to leave it doubtful whether the receipt was received in evi-

dence, but its contents appear sufficiently to show that it was a release from all claim for damages by Baker for an indecent assault on his wife); that plaintiff did not read the receipt, and that he returned on the same night to St. Paul and went on with his stock to Glendive, Montana, where he disposed of his stock; that he had no friends or relatives at Glendive, that he was not feeling well, lost in weight, and did not sleep well because he was worrying about the matter; that in about twenty days he sent the money to defendant to pay the note and the note was returned to him and destroyed by him; that he thought he had to pay the note or submit to a criminal prosecution by the defendant; that he met a Mr. Fish, his brother-in-law, in St. Paul, who told him he was foolish to pay the note; that he (plaintiff) told Fish that if he didn't pay it he would be criminally prosecuted and sent over the road; that he took no advice of any lawyer, although he could have done so in St. Paul or in Montana.

D. W. McNamara and *John A. Conant,* for the appellant.

For the respondent there was a brief by *Metzler & Metzler,* attorneys, and *Grady, Farnsworth & Kenney,* of counsel, and oral argument by *D. H. Grady.*

WINSLOW, C. J. The plaintiff's evidence may not be true; it is certainly to be hoped that it is not true. It is not incredible, however, and, for the purpose of the motion for nonsuit, must be treated as true. In brief, the case made by the plaintiff is this: An innocent man, found in a somewhat compromising situation with a married woman, is repeatedly threatened by the district attorney of the county with prosecution and conviction of adultery, and under the stress of such threats gives his note for $800 to settle the matter and at once goes to a distant state, procures the money to pay the note, and remits it to the defendant within twenty days, without advising with counsel and because he believes the prosecution will proceed if he does not do so.

It certainly would be a reproach to the law if such things can be done with impunity. The law is neither so weak nor so unjust as this.

Duress is a relative rather than a positive term. Much depends on the situation of the parties, their relations to each other, physical and mental strength, and all the surrounding circumstances. Acts which might fall far short of duress under certain conditions might be ample under other conditions. The threat of an enraged boy to commence a criminal prosecution might be unworthy of notice; the same threat by a man of experience in the world might well cause anxiety; while the same threat by the state's official prosecutor could hardly fail to cause deep solicitude if not actual terror. It is apparent also that a threat which would have no serious effect on a strong, experienced business man would be terrifying in the extreme to a nervous or weak person with little or no experience in the world. There are no arbitrary and unbending rules which can be applied in every case to determine the question. True, the person claiming duress must be so strongly influenced that his acts are not the result of his own will, but the threats which would accomplish that result in one case might be entirely insufficient in another.

It was correctly said in *Galusha v. Sherman,* 105 Wis. 263, 278, 81 N. W. 495:

"There is no legal standard of resistance which a party so circumstanced must exercise at his peril to protect himself. The question in each case is, Was the alleged injured person, by being put in fear by the other party to the transaction for the purpose of obtaining an advantage over him, deprived of the free exercise of his will power, and was such advantage thereby obtained?"

Much reliance is placed by respondent upon the fact that the plaintiff went to another state, where he could advise with attorneys if he chose, and remained there two or three weeks before paying the note. During this time there was

no communication between plaintiff and defendant, and it is said that under such circumstances there could be no duress as a matter of law. The cases of *Wolff v. Bluhm,* 95 Wis. 257, 70 N. W. 73; *Rochester M. T. Works v. Weiss,* 108 Wis. 545, 84 N. W. 866; and *Bennett v. Luby,* 112 Wis. 118, 88 N. W. 37, are relied on to support this contention.

It is true that in each of these cases it was held that no duress was shown and that in each case the fact that several days elapsed between the making of the threats and the payment of the money was considered as an important consideration in reaching the result. This is far from saying, however, that such a fact will in all cases negative duress, and such a holding would manifestly be illogical. The ultimate test after all is the condition of mind produced by the threats and existing at the time of the payment. It may well be that the lapse of a year or more without renewal of the threats (as in the case of *Schultz v. Culbertson,* 46 Wis. 313, 1 N. W. 19) between the giving of the note and its payment should be held to be conclusive against any claim of duress in the payment, but in the last named case it was wisely said that "perhaps a jury would be warranted in finding that the original duress continued" had the note been paid soon after it was given.

The case before us is quite out of the ordinary in the fact that the threats of prosecution and conviction were made, if made at all, by the law officer of the state whose duty it is to prosecute criminal offenses. Threats of prosecution made by the state's attorney differ materially from similar threats made by a layman or private attorney in that they bear the added weight of the power vested in that officer to institute, and to a certain extent control, criminal prosecutions; a power which is often exaggerated in the mind of the layman. It is very easy to understand that such a man as the plaintiff might have his free will absolutely coerced by a district attorney's threat of prosecution, and it is easy to see also how

the influence of such a threat might remain for two or three weeks and while the coerced party was actually in a foreign state, for the functions of requisition proceedings are very generally understood and the district attorney's power over such proceedings thought to be plenary. In view of these exceptional circumstances we think the case should have gone to the jury, and we do not consider that this holding in any way overrules the cases previously cited herein and relied on by the respondent as justifying the nonsuit.

We cannot close this opinion without remarking on the inadvisability, almost amounting to impropriety, of the district attorney acting as attorney to recover civil damages arising from a supposed criminal act.

In such matters the prosecuting attorney of the state cannot serve two masters. Justice is his sole client, and any private retainer which in any way tends to sway his judgment or distort his vision as to the character of the act should be sedulously avoided.

The distinction between civil and criminal liability is apt to be much confused in the lay mind, as well as the distinction between an attorney's acts in his capacity as a public prosecutor of crime and his acts as a private attorney. The code of ethics of the district attorney in all such matters cannot too closely follow the ethics of the bench; indeed, his duties are *quasi*-judicial in their nature.

As said in the beginning, it is to be hoped that the plaintiff's story is not true, and that the district attorney will be able to show that he has not been guilty of the indefensible conduct charged. When such charges are afloat he should welcome the opportunity to meet and crush them. He will have that opportunity now.

By the Court.—Judgment reversed, and action remanded for a new trial.

Barnes, J. (*dissenting*). The rule is well established that the court will not reverse a decision of the trial court

granting a nonsuit or directing a verdict unless such decision appears to be clearly wrong.

It is equally well established that in order to constitute legal duress the threats used must produce such a condition of mind as to destroy the free agency of the person threatened. *Batavian Bank v. North,* 114 Wis. 637, 90 N. W. 1016; *Galusha v. Sherman,* 105 Wis. 263, 81 N. W. 495; *Wolff v. Bluhm,* 95 Wis. 257, 70 N. W. 73.

When the plaintiff gave the note he had sufficient control of his mental faculties to dicker considerably about the price to be paid. After that he had about three weeks to think it over, during which time he went to a neighboring state and counseled with his brother-in-law. After having this period for reflection and deliberation he paid the note. It seems to me that the trial court might well conclude that the mind of this banker and stock-buyer was not in such a condition that he was not acting as a free agent when he paid the note. Leastwise, I do not think it should be said that the circuit judge was clearly wrong in reaching such a conclusion.

If the testimony of the plaintiff is true, the conduct of the district attorney was more than reprehensible. In any event it is subject to just animadversion. The court is of the opinion that it would be a reproach upon the law to deny recovery in this case if plaintiff's version of the transaction with the defendant is true. I do not think so, unless an actual case of duress is made out. On plaintiff's evidence he is a briber pure and simple unless his will power was overcome when he paid the note. He paid the prosecuting officer $800 as a bribe to secure immunity from prosecution for adultery. He is as "deep in the mud" as the defendant is "in the mire," and the law should leave him where it finds him. There are other methods of dealing with the defendant if he has been guilty of the misconduct claimed.

VAN VALKENBURG, Executrix, Respondent, vs. JANTZ and others, Appellants.
SAME, Appellant, vs. SAME, Respondents.

September 15—October 5, 1915.

Equity: Action to set aside deed: Recovery on note: Interest: Costs: Vendor and purchaser of land: Payment of mortgage by grantor: Subrogation: Setting aside covenants of warranty.

1. Where the vendor of land, never having demanded payment of a demand note given for a part of the consideration, and treating such note as void and subject to be returned to the vendee, sought by equitable action to have the conveyance declared void for undue influence, but failed to sustain such claim of fraud, and the vendee was found to be indebted on the note according to its tenor, such vendor had no legal right to judgment for recovery on the note, but in order to do complete justice and terminate the litigation the court properly adjudged the amount due and provided for enforcement of a vendor's lien therefor.
2. Interest on the note from the time of the commencement of the action was properly allowed in such case, the defendant not having offered to pay the note; but plaintiff should not have been awarded costs incidental to recovering on the note.
3. Land subject to a mortgage given by the owner for his own indebtedness having been conveyed by him by deed with full covenants, reserving a life estate, and the grantee not having agreed to pay the mortgage, when the grantor thereafter, voluntarily and to protect his life estate, paid the debt and caused the mortgage to be discharged of record, he was not entitled, as against the grantee, to be subrogated to the rights of the mortgagee, even though he did not understand the effect of his covenants and paid the debt thinking, nevertheless, to preserve the lien.
4. Covenants in a conveyance of land should not be annulled merely because the grantor did not understand their legal effect.

APPEALS from a judgment of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Affirmed in part; reversed in part.*

Equitable action to set aside two deeds upon the ground that they were procured by fraud and undue influence.

In 1904, Minnie Smith, an aged lady, while in poor

health and residing with her daughter *Agnes,* deeded her farm, consisting of two forty-acre tracts, worth about $6,000, one half to *Agnes* and one half to her son *Edward.* She intended thereby to make a final disposition of her property subject to a life estate in herself. She was not able to read and write English or to speak it but little. *Agnes* was quite active in procuring the deeds to be made. Each was in the ordinary form of a warranty deed, reserving a life estate to the grantor, and expressing for a consideration, "Two hundred dollars and other good and valuable considerations." Nothing was in fact paid, but each grantee gave the grantor a demand promissory note for $200, which had not been paid when the judgment was rendered. The grantor controlled the farm, paid the taxes, and kept up the repairs after the deeds were made, the same as before. When the transaction occurred there was a mortgage on the property given by Mrs. Smith to secure an indebtedness of her own of $800. Subsequently, she paid the same and the mortgage was discharged of record. She was divorced from her husband some less than a year before the deeds were made. He was a second husband and not the father of the grantees. They were fearful their mother would return to him, which she did. She subsequently commenced this action. Pending the same she died and the action was duly revived and other proper party defendants brought in.

The court decided, on evidence tending to establish the same, this: Mrs. Smith intended to give the lands to her two children, but not to warrant the title. She did not understand the effect of her covenants. When she paid off the $800 mortgage she did so to protect her life interest, and not to protect her grantees. With the purpose of preserving the mortgage interest for herself, she kept the mortgage, the notes, and the satisfaction. Before commencing this action she demanded a reconveyance of the lands, claiming that the deeds were procured by undue influence and were executed

by her in ignorance of their contents. Persons claiming under her grantees were brought in as defendants. They took with knowledge of her rights.

The decision thus expressly, or inferentially, negatived the claim of fraud and undue influence; but was in plaintiff's favor to the extent of holding that Mrs. Smith did not understand her conveyance to contain a provision requiring her to remove the incumbrance of $800, though there was no finding to the effect that the grantees were at fault in the matter.

Upon such facts the court decided, as matter of law, that plaintiff could not have judgment canceling the deeds; but was entitled to be subrogated, as to the mortgage lien of $800; also to a vendor's lien for the amount due on the notes, including interest from the time of the commencement of the action, and to the usual judgment of foreclosure in such cases, including appropriate provisions for recovery of costs and solicitor's fees stipulated in the mortgage. Judgment was rendered accordingly.

Plaintiff appealed upon the ground that the court should have found the undue influence alleged, and rendered judgment canceling the deeds. Defendants appealed upon the ground that the judgment as to the mortgage, and the money consideration mentioned in the deeds, is erroneous.

For the plaintiff there was a brief by *Maurice McKenna*, attorney, and *Carter & Pedrick*, of counsel, and oral argument by *S. M. Pedrick*.

For the defendants there was a brief by *Swett & Keck*, and oral argument by *H. E. Swett*.

Marshall, J. The findings of fact seem to be efficiently supported by the evidence, leaving only questions of law hereafter stated to be considered.

1. If a person owes another upon a demand note, given as evidence of indebtedness of such person to such other for

real property conveyed by the latter to the former, and the vendor seeks by equitable action to have the conveyance declared void for undue influence, never having demanded payment of the note, but treating the same as void and subject to be returned to the maker, and such person fails to sustain the claim of fraud, but is shown to be indebted upon the note according to its tenor,—may the court, properly, so declare, allowing interest from the commencement of the action, and adjudging the sum due with costs to be a lien upon the realty, and provide for enforcing the same?

The proposition stated fits this case as to the notes. In such circumstances the payee of the note does not possess a matured legal claim at the time of commencing the action; hence, does not possess a legal right to judgment for recovery of the amount due for principal nor for interest or costs. However, it would be competent for a court of equity, for the purpose of doing complete justice and terminating the litigation, to enforce payment of the indebtedness, dealing with the question of interest and that of costs according to the equities between the parties.

Applying the foregoing to the case before us, we can perceive good reason for allowance of interest from the time the litigation commenced, or the time when the debtors must have been fully informed that the creditor was, at least, entitled to payment of the notes and to a vendor's lien to enforce such payment. If the former desired to prevent liability for interest, they should have offered to pay the notes and tendered payment in the answer. Since they failed to do that and contested the equitable claim to recover in the action the amount due, it was competent for the court to allow interest, as was done; but there were no circumstances which, legally or equitably, entitled plaintiff to recover costs, incidental to recovering upon the notes. Had the debtors tendered payment of the notes, it would not have been accepted. Plaintiff would, nevertheless, have persisted in order to avoid

the deeds or, failing in that, to obtain the equitable lien and subrogation decreed. So there was no fault on defendants' part for which they should be made to pay costs as to the notes.

2. If a person for a sufficient consideration conveys land to another by deed with full covenants, reserving a life estate therein, and the land at the time of the conveyance is subject to such person's own mortgage indebtedness which the grantee does not, in the deed or otherwise agree to pay, and, later, such person, voluntarily, and to protect his life estate pays off the indebtedness and causes the mortgage lien to be discharged of record; has such person the equitable right of subrogation to the original lien under the mortgage as against his grantee, because such person when he made the deed, without fault of the grantee, did not understand the effect of the covenants therein, and, later, paid the indebtedness thinking, nevertheless, to preserve the lien?

The stated proposition pictures plainly the situation the trial court had to deal with in solving the question of whether the $800 mortgage should be regarded as outstanding for the protection of Mrs. Smith's estate.

It is hardly sufficient to warrant decreeing the covenants in a deed ineffective, because the covenantor did not understand the legal effect of them, there being neither mutual mistake nor mistake upon one side and fraud upon the other. According to the findings there was no circumstance warranting the court in setting the deeds aside or annulling any feature thereof upon any of the grounds alleged.

It is conceded that if the grantor was bound by her covenants, there was no justification for the decree treating the mortgage lien, though extinguished as to the mortgagor, as, nevertheless, existing as against her grantees; but, waiving that, we are unable to discover any basis for applying the equitable doctrine of subrogation, as was done. That no such basis exists must be clear from the governing principles of the subject as this court has often stated them:

"Subrogation existed entirely independent of contract relations. It is wholly a creature of equity,—a means by which the substantial ends of justice may be accomplished. If a person pays off a lien claim on property for which he is not, but another is, liable so that such other would derive the benefit thereof, if his interest in the property were entirely relieved from such lien, and such person acts in the matter, not as a mere volunteer, but to protect his own interest in such property, such interest being legal or equitable, and either present or contingent, equity immediately operates in favor of such person by preserving such lien claim to him with the same right to enforce it as the original owner possessed, to the extent that such person would otherwise suffer loss to such other's gain." *Charmley v. Charmley,* 125 Wis. 297, 103 N. W. 1106.

"Subrogation . . . is a creation of the law whereby the substantial ends of justice may be accomplished regardless of contract relations. If a person for the protection of his title to property is compelled to pay off a lien thereon for a debt which he is not liable for, so that another having an interest in the property and who stands prior in obligation to pay the debt, either because of being the debtor or being more immediate to the creator of the lien, will be relieved of the burden, equity immediately operates in favor of the payor, preserving the lien for his protection to the extent that he would otherwise suffer loss to such other's gain." *Poluckie v. Wegenke,* 137 Wis. 433, 437, 119 N. W. 188.

Mrs. Smith did not pay a debt which another was obligated to pay. She merely paid her own debt. Her grantees neither agreed to pay it nor were they liable therefor nor were they requested to pay it. The circumstances of the case do not satisfy the logic of the doctrine of subrogation in any essential particular.

It follows that the judgment in plaintiff's favor, except as to the vendor's lien for the amount due on the notes, is wrong and that there was no legitimate basis for granting costs against defendants.

By the Court.—On plaintiff's appeal the judgment is affirmed so far as it sustains the deeds and fixes the amount

due on the notes and provides for enforcement thereof by vendor's lien.

On defendants' appeal the judgment is reversed as to the matter of subrogation, the modification of the deeds, and as to awarding costs to plaintiff.

The cause is remanded for judgment in accordance with the foregoing and for costs in defendants' favor. No costs are allowed plaintiff in this court on either appeal; but full costs are allowed defendants on their appeal, and no costs on plaintiff's appeal.

Roundy, Peckham & Dexter Company, Respondent, vs. Baldwin, Appellant.

September 16—October 5, 1915.

Contracts: Consideration: Statute of frauds.

A written promise, by one taking over the goods and business of a retailer who was indebted to a wholesaler, to continue the business until all obligations of said retailer were satisfied, was, where relied upon by the wholesaler, based upon sufficient consideration and was a binding obligation to pay the debt to the wholesaler.

Appeal from a judgment of the circuit court for Oconto county: W. B. Quinlan, Circuit Judge. *Affirmed.*

The cause was submitted for the appellant on the brief of *George Crawford,* and for the respondent on that of *Francis X. Morrow* and *Classon & O'Kelliher.*

Kerwin, J. Judgment for plaintiff was rendered in justice's court and affirmed on appeal to the circuit court. From the stipulated facts it appears:

"That for some time prior to July 22, 1913, one L. H. Baldwin, Jr., son of the defendant, was owner of and operated a grocery store at Gillett, Oconto county, Wisconsin.

"That said L. H. Baldwin, Jr., was at said time indebted to plaintiff, a wholesale grocery company of Milwaukee, in the sum of one hundred nine and 30/100 ($109.30) dollars.

"That some time prior to July 22d and while so indebted to the plaintiff the said L. H. Baldwin, Jr., turned over to this defendant his said business and store without giving any notice to his creditors as required by law in case of a sale of an entire stock of goods and without in any way complying with the Wisconsin law in regard to sales of stock of goods.

"That under date of July 22, 1913, and after defendant had so taken over the business of L. H. Baldwin, Jr., he wrote the following letter to the plaintiff:

" 'July 22, 1913.

" '*Roundy, Peckham & Dexter Company,* Milwaukee, Wis.

" 'Gentlemen: L. H. Baldwin, Jr. (my son), has gone out of business. I however will continue the business until all obligations are satisfied (his), and since there are many, and I discount all my bills, it may come rather slow for a time.

" 'Give me cash figures of all I purchase of you, or shall I deduct the discount? Place the inclosed check to the credit of L. H. Baldwin, Jr. L. H. BALDWIN.'

"That plaintiff after receiving said letter never took any steps to collect its account from the stock of goods of L. H. Baldwin, Jr.

"That there was no dispute as to the amount of the indebtedness of L. H. Baldwin, Jr., and that judgment was taken against the defendant for the amount conceded to be due."

Upon the admitted facts we are of opinion that the plaintiff was entitled to judgment. The appellant contends that there was no promise on his part to pay and no consideration sufficient to support a promise.

The court below held, and we think correctly, that there was a valid promise and a binding obligation upon the defendant under the established facts to pay the claim in question. *Lessel v. Zillmer,* 105 Wis. 334, 81 N. W. 403; *Tweeddale v. Tweeddale,* 116 Wis. 517, 93 N. W. 440.

The defendant took over the goods and business, agreed to

pay the debts of his son, L. H. Baldwin, Jr., and plaintiff relied upon such promise. The promise was valid and based upon a sufficient consideration.

By the Court.—The judgment is affirmed.

De Laval Separator Company, Appellant, vs. Hofberger, Respondent.

September 16—October 5, 1915.

Justices' courts: Jurisdiction: Garnishment: Publication of summons: Adjournments: Presumptions: Continuance: Payment of fees to garnishee: Costs: Proof of service: Amendment of return: Certiorari: *Quashing writ.*

1. The rule that justices of the peace must keep strictly within the limits of the jurisdiction conferred upon them does not mean that the higher courts are to be hostile to their judgments, but merely that the justices are to exercise only the jurisdiction conferred upon them by statute fairly construed.
2. Where the return of the officer on the principal summons in justice's court was that the defendant "not being found and having no residence or no known agent or attorney within the said county, I am unable to serve upon the within named defendant," and a garnishee answered admitting indebtedness to the defendant, such return and answer were sufficient to authorize service of the garnishee summons upon the principal defendant by publication, under sec. 3718, Stats.
3. Within the meaning of sec. 3718, Stats., a member of the defendant's family residing within the jurisdiction of the justice must be residing at defendant's residence.
4. A second adjournment of a cause in justice's court will be presumed to have been for cause, although the docket does not so state.
5. Holding open a garnishee action to await the termination of the principal action is equivalent to a continuance for that purpose.
6. Where a garnishee voluntarily appears and answers, failure to pay fees to him is not a jurisdictional defect.
7. Adding the costs of a garnishee action to the judgment in the principal action is error, but does not go to the jurisdiction.

8. The judgment of a justice's court in the principal action is not so affected as to be open to attack on writ of *certiorari* by the fact that the garnishee failed to pay into court the sum which he was ordered to pay in.
9. It is the fact of service of the summons upon defendant, and not merely the proof of that fact, which gives a justice jurisdiction, except in those cases where by statute jurisdiction is made to rest on the proof; and even after the issuance and service of a writ of *certiorari* an amended return showing proper service of the summons should be taken to cure any omissions in the original return.
10. Where in the petition for a writ of *certiorari* to review a justice's judgment for a trifling sum it was not denied that defendant owes that sum, and the objections to the judgment are technical and do not relate to jurisdiction of the subject matter, the circuit court should quash the writ *sua sponte.*

APPEAL from a judgment of the circuit court for Oconto county: W. B. QUINLAN, Circuit Judge. *Reversed.*

Upon the petition of the defendant a writ of *certiorari* issued from the circuit court to review the judgment of a justice's court. Other facts are stated in the opinion. This appeal is from a judgment of the circuit court reversing the judgment of the justice.

The cause was submitted for the appellant on the brief of *E. C. Smith,* and for the respondent on that of *George Crawford.*

TIMLIN, J. About four years ago the appellant began suit in justice's court against the respondent to recover a balance of $4.35. This trifling controversy has been in litigation ever since in justice's court, circuit court, and now in the supreme court. It is not denied that the respondent owes this sum to the appellant, but the litigation has been over the question whether the appellant proceeded properly, or rather whether the appellant's lawyer and the justice of the peace proceeded properly, in appellant's attempt to collect this small sum.

The science of jurisprudence must be far from perfection

when the real object and purpose of an action can be lost sight of and a judicial controversy relating to questions of procedure and having no concern with the merits of the action in this way substituted for the real controversy between the parties. Courts of justices of the peace are recognized in the constitution and statutes of this state and they are supposed to furnish cheap and convenient tribunals for the determination of petty differences which may arise between parties. It requires no argument to establish that the way to such courts should be smooth and easy. It was long ago declared to be the law that such inferior tribunals must keep strictly within the limits of the jurisdiction conferred upon them; but this does not mean that the superior courts are to be hostile to their judgments or solicitous to trip them up for every petty error. It means that the justices are to exercise only the jurisdiction conferred upon them by statute fairly interpreted. This court has been for some time engaged in an attempt to mitigate the rigor of some of the ancient rules on this subject. *Cowles v. Neillsville,* 137 Wis. 384, 119 N. W. 91; *State ex rel. Cooper v. Brazee,* 139 Wis. 538, 541, 121 N. W. 247; *Kremer v. Arians,* 141 Wis. 662, 124 N. W. 1064; *Kuehn v. Nero,* 145 Wis. 256, 130 N. W. 56; *State ex rel. Kassner v. Momsen,* 153 Wis. 203, 140 N. W. 1117.

On October 24, 1911, a summons in favor of the plaintiff and appellant and against the respondent, returnable November 1, 1911, was issued by a justice of the peace. At the same time and in the same action a summons in garnishment, returnable at the same time and place, was properly issued, wherein one Perry was summoned as garnishee defendant. The officer to whom the original summons was delivered for service made the following return: "[Venue.] I hereby certify that *Frank J. Hofberger* not being found and having no residence or no known agent or attorney within the said county, I am unable to serve upon the within named

defendant." Perry appeared in response to the summons in garnishment and filed his written answer, duly verified, admitting an indebtedness to the defendant in the sum of $15 or $20. The defendant *Hofberger* did not appear either in the garnishment action or in the principal action. Each action was then adjourned until December 1, 1911, and an order for publication made against the principal defendant. December 1, 1911, the principal case was called and held open until December 2d.

On the date last mentioned, after receiving and filing affidavit of publication, judgment was rendered in favor of the plaintiff for $12.66 damages and costs and the garnishee defendant was ordered to pay that sum into court.

We decide all points in the case, including those not specifically mentioned in the foregoing statement, as follows:

(1) The return of the officer on the principal summons was, with the answer of the garnishee, sufficient to authorize service by publication under secs. 3718, 3712, 3713, Stats. Sec. 3718 relates to the service of the garnishee summons upon the principal defendant. The section relating to service of summons in justice's court is sec. 3600, and there substituted service is made, when the defendant be not found, by leaving a copy thereof at his usual place of abode in the presence of some one of his family of suitable age and discretion, who shall be informed of its contents. The garnishee summons may be published if the defendant cannot be found or is not a resident of the state, "unless he shall have a known agent or attorney residing within the jurisdiction of the justice, or some member of his family, of suitable age and discretion, shall reside within the same." [Sec. 3718.] This must be construed with the other statute, and a member of the defendant's family residing within the jurisdiction of the justice must be residing at defendant's residence or place of abode, otherwise such person could not be a member of defendant's family. *Hall v. Hall,* 25 Wis. 600. The word

"residence" is synonymous with "abode," and the case of *Shearer v. Davis & Starr L. Co.* 78 Wis. 278, 47 N. W. 360, in no way conflicts with this.

(2) The second adjournment so called, from December 1st to December 2d, must be presumed to have been for cause under *State ex rel. Dearborn v. Merrick,* 101 Wis. 162, 77 N. W. 719; and *Field v. Heckman,* 118 Wis. 461, 95 N. W. 377.

(3) Holding open the garnishee case to await the termination of the principal action is equivalent to continuing the case for that purpose.

(4) Failure to pay fees to the garnishee, the latter having voluntarily appeared and answered, is not a jurisdictional error.

(5) Adding the costs of the garnishee action to the judgment in the principal action was error, but not going to the jurisdiction.

(6) This writ of *certiorari* runs to the judgment in the principal action, and that judgment is not affected by the fact that the garnishee failed and neglected to pay into justice's court the sum found in his hands to be due and ordered paid in.

(7) After the issue and service of the writ it clearly appeared by amended return that proper service was made on respondent. This should have been taken to cure any omissions in the original return, if such cure was necessary, for it is the fact, not merely the proof of the fact, which gives the justice jurisdiction, except in those cases where by statute jurisdiction is made to rest on the proof.

(8) It is not denied in the petition for this writ that the defendant owes the small sum for which the action was brought, and, that being so, the court in a case like this where the amount is trifling and the objections technical and do not relate to jurisdiction of the subject matter, should have quashed the writ *sua sponte* under the rule in *Knapp v.*

Heller, 32 Wis. 467, and *Tourville v. S. D. Seavey Co.* 124 Wis. 56, 102 N. W. 352.

By the Court.—Judgment reversed, with directions to quash the writ of *certiorari.*

PEOPLE'S LAND & MANUFACTURING COMPANY, Appellant, vs. BEYER, Respondent.

September 16—October 5, 1915.

Real property: Lawful use: Motive: Landlord and tenant: Agreement as to lighting: Inducing tenant to discontinue existing service: Injunction.

1. As a general rule, whatever a man may lawfully do on his own property under any circumstances, he may do regardless of the motive for his conduct.
2. The owner of a building has a legal right to lease it on such terms as he and the tenants may agree to with reference to the lighting thereof.
3. Thus, where tenants might themselves discontinue the lighting service which was being furnished to them by one company, and the lessor might terminate their leases on short notice, he had the right to require as a condition of continuing the tenancies that the current for lighting be obtained from another company.
4. Although in such case the company which had been furnishing the service was entitled to a preliminary injunction restraining the cutting or disconnecting of its wires without notice, yet when it appeared that in so doing the new company was acting contrary to the instructions of the lessor and that there was no intention to proceed arbitrarily or without notice in the future, there was no sufficient ground for continuing the injunction in force against the lessor.

APPEAL from a judgment of the circuit court for Oconto county: W. B. QUINLAN, Circuit Judge. *Affirmed.*

The plaintiff is a public utility corporation engaged in the business of furnishing electric current for lighting purposes in the city of Oconto. The Oconto Electric Company is a

rival corporation engaged in the same line of business. The defendant at one time was a stockholder in the plaintiff corporation, but sold his stock in such company before the commencement of this action. The defendant, either individually or by virtue of his interest in a real-estate corporation, owned or controlled eleven buildings in the city of Oconto at the time of the commencement of this action, which were occupied by fourteen different tenants. Most of these tenants were patrons of the plaintiff corporation, in that they purchased their current for lighting purposes from such corporation. The defendant persuaded and induced the tenants to discontinue the purchase of current from the plaintiff and to buy from the rival company. The last named company was about to cut the wires of the plaintiff and connect its own wires with the buildings in question when this action was commenced for the purpose of restraining the defendant from inducing the customers of the plaintiff to withdraw their business from plaintiff, and also to restrain the defendant from interfering with the business property or electric wiring connections of the plaintiff. A temporary restraining order was issued. The defendant answered, denying most of the allegations of the complaint. The parties submitted their proofs and the court made its findings of fact and conclusions of law, wherein it was found that the tenants had the right to discontinue the plaintiff's service on reasonable notice and to purchase current elsewhere; that before the commencement of the action the defendant, entertaining hostile feelings toward Mr. Pamperin, the president of the plaintiff corporation, and because of his desire to have nothing further to do with him, interviewed his tenants and arranged that the buildings occupied by them should be lighted with electricity furnished by the rival company and that the lighting bills be rendered to the defendant and charged to the tenants to be paid with their rent; that each of the tenants, though satisfied with plaintiff's service, was willing to make

such change, and that in making such arrangement with the tenants the defendant used neither threats, coercion, misrepresentation, violence, fraud, persuasion, undue influence, or other harassing method; that such arrangement was not carried out because of the order referred to; that pursuant to such arrangement the defendant notified the rival company to install its service in said buildings and directed such company to notify the plaintiff to disconnect its wires therefrom, but such notice was not given plaintiff; that the rival company started to disconnect plaintiff's wires from one of said buildings, whereupon the preliminary order was issued and was thereafter continued in force; that immediately after the issuance of said order the work of disconnecting said wires was stopped and all of said buildings remained connected with the plaintiff's system and the injunctional order has in all respects been obeyed, and that no ground exists for the continuance of said injunctional order entitling the plaintiff to judgment for any of the relief prayed for in the complaint, except costs.

As conclusions of law the court found that the plaintiff was justified in commencing the action because it was entitled to reasonable notice of the discontinuance of its service to the defendant's buildings and reasonable opportunity to disconnect its own wires; that the defendant had the right, regardless of his motive, to negotiate with his tenants with reference to the use of electricity in said buildings, and, on reasonable notice, to have the service furnished by the plaintiff discontinued and to have the buildings lighted with electricity furnished by the rival company, and to lease his buildings on such terms as the lessor and tenants might agree to with reference to the lighting thereof.

From a judgment entered in accordance with these findings the plaintiff appeals.

For the appellant there were briefs by *Kittell & Burke,* and oral argument by *J. A. Kittell.*

For the respondent there was a brief by *Greene, Fairchild, North, Parker & McGillan,* and oral argument by *J. R. North.*

Barnes, J. Error is assigned because the court refused to permanently enjoin defendant from interfering with plaintiff's wires until after notice to remove was given and a reasonable time in which to remove them had elapsed.

The circuit judge reached the conclusion that the Oconto Company, in proceeding to cut plaintiff's wires and discontinue its service without notice to plaintiff, was acting contrary to instructions given by defendant and that there was no purpose or design on defendant's part to proceed arbitrarily and without notice in the future, and that therefore no sufficient reason existed for continuing the preliminary injunction in force so as to require notice to plaintiff and opportunity to remove its wire connections and meters before proceeding to cut its wires. We think the testimony sustained the conclusion reached by the circuit judge.

Plaintiff's main contention is that defendant should have been permanently enjoined from inducing or influencing persons to discontinue the use of electricity furnished by plaintiff, even though they occupied buildings owned or controlled by the defendant.

It may be assumed that plaintiff had and has a legal right to sell its current to those who desired to use it and that such a right is entitled to legal protection. It could lawfully be interfered with, however, by one who had an equal or superior right. *Johnson v. Ætna L. Ins. Co.* 158 Wis. 56, 147 N. W. 32. The general rule is that whatever a man may lawfully do on his own property under any circumstances, he may do regardless of the motive for his conduct. *Metzger v. Hochrein,* 107 Wis. 267, 270, 83 N. W. 308; *Marshfield L. & L. Co. v. John Week L. Co.* 108 Wis. 268, 84 N. W. 434; *Huber v. Merkel,* 117 Wis. 355, 94 N. W. 354.

It is conceded that the tenants might themselves discontinue the use of plaintiff's current on reasonable notice, and it was found by the court that their leases ran from month to month, so that they might be terminated on short notice. The real question is, Does the judgment permit the defendant to do things which he has no legal right to do? Defendant could legally refuse to rent his buildings if he saw fit. He might rent them with lights furnished, and we think he would be clearly within his rights in saying to a tenant that he could lease only on the condition that an obnoxious company be not permitted to convey its current into the building. It is necessary for a lighting company to send its employees into a building occasionally to examine the wiring, replace burned out fuses, and read meters. If for any reason satisfactory to himself the owner of a building does not desire to have the employees who are under the direction and control of a personal enemy doing work of this character around his building, he has a right to say to his prospective tenant that he can only lease on condition that light be procured from some other source. We have not before us the case where a tenant had a long-term lease which did not place any restriction upon him in regard to the purchase of current. The defendant was in a position where he might terminate his tenancies on short notice and insist on new leases. In fact it does appear that new agreements were made whereby the landlord was to arrange and pay for the lighting, adding the amount thereof to the tenants' rent bills. Under the facts of this case the court was right in holding that the permanent injunctive relief sought should not be granted.

Exception is taken to one of the findings of fact made by the trial court. The judgment is correct whether the finding complained of is right or wrong.

By the Court.—The judgment and order appealed from are affirmed.

LAURENT, Appellant, vs. VAN SOMPLE, Respondent.

September 16—October 5, 1915.

Slander: Words not actionable: Special damage.

1. Words alleged to have been spoken by the pastor of a church concerning plaintiff, who had charge of the collection of the accounts of the parish, to the effect that the books showed that a certain sum had been collected but there was "no account to show what became of it," are *held* not to be actionable *per se*, because they do not in their natural and ordinary meaning charge a criminal offense but merely slovenly or imperfect bookkeeping.
2. Alleged loss of customers in his business as a blacksmith cannot be *held* to be the natural or proximate result of the charge of bad bookkeeping so made, so as to render the words actionable.

APPEAL from a judgment of the circuit court for Oconto county: W. B. QUINLAN, Circuit Judge. *Affirmed.*

This is a slander action. A demurrer *ore tenus* to the complaint was sustained and the plaintiff appeals. The complaint charges in substance that the plaintiff is a blacksmith and wagonmaker in business as such at Lena, Oconto county, Wisconsin; that defendant is a priest and the pastor of the Catholic church at Lena; that in January and February, 1913, the plaintiff was a trustee of said church and secretary of the board of trustees having charge of the collection of the accounts of the parish; that on January 18, 1914, the defendant, while speaking to the congregation about the accounts of the church and the moneys collected and handled by the trustees and the plaintiff, after reading the accounts maliciously spoke of the plaintiff, in the presence of the entire congregation, the following words: "What was done between January and March, 1913, I am not responsible for. There was sixty-odd dollars collected that I cannot account for. I have nothing to show. This is for accounts of January and February, 1913. The books show that this was collected, but there is no account to show what became of it;" meaning to charge and being understood by the hearers to

charge the plaintiff with larceny and embezzlement of the funds of the church. It is also alleged that by reason of the speaking of the words the plaintiff has been damaged in his business and lost numerous customers and greatly injured in his reputation, all to his damage in the sum of $3,000.

For the appellant there was a brief by *Classon & O'Kelliher,* and oral argument by *J. V. O'Kelliher.*

J. H. M. Wigman, for the respondent.

WINSLOW, C. J. It is held in this case that the judgment was right because (1) the words alleged do not in their natural and ordinary meaning charge a criminal offense but merely slovenly or imperfect bookkeeping; (2) if it be held that they are defamatory in their nature and hence slanderous because special damage is alleged (*Servatius v. Pichel,* 34 Wis. 292), the answer is that loss of customers by a blacksmith cannot be held to be the natural or proximate result of a charge of bad bookkeeping.

By the Court.—Judgment affirmed.

SIEBECKER, J., dissents.

PEDERSEN and wife, Respondents, vs. HANSEN and wife, Appellants.

September 16—October 5, 1915.

Reformation of instruments: Mistake: Evidence: Sufficiency.

Reformation of a contract for the conveyance of land to defendants was properly adjudged in this case, the evidence being clear, convincing, and satisfactory that by mistake the contract did not express the agreement of the parties in that it failed to state that defendants assumed a mortgage upon the land.

APPEAL from a judgment of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Affirmed.*

This action was brought to reform a written instrument. The court below found and concluded:

"(1) That the plaintiffs, *Jens N. Pedersen* and *Kirstine Pedersen,* are husband and wife, as are also the defendants, *Hans M. Hansen* and *Alma Hansen.*

"(2) That sometime in the month of March, 1912, and prior to the 8th day of April, 1912, the plaintiffs and defendants entered into a contract in writing for the exchange of plaintiffs' farm of 120 acres, more or less, in Monroe county, Wisconsin, being the premises described in paragraph 2 of the complaint, for defendants' house and lot in the city of Racine, Wisconsin, each to be taken at an equal valuation and title to be conveyed by each grantor free and clear of incumbrances, but the plaintiff *Jens N. Pedersen* was to pay $100 commission to the real-estate agents who brought the parties together.

"(3) That at the time of making said contract the plaintiffs' farm was subject to a mortgage of $1,700 and the defendants' property was subject to a mortgage of $3,400; and that the parties expected to carry out their contract by conveying the two properties and at the same time 'switching' or transferring the mortgages each from the property covered by it to the property taken in exchange, but the defendant *Hansen* was unable to induce the holder of the $3,400 mortgage to accept the farm as security and was unable otherwise to clear his title.

"(4) That thereupon it was agreed by the parties to leave the two mortgages undisturbed and that each should take the property of the other subject to the payment of the mortgage then existing thereon, and the defendants should pay to the plaintiffs the difference, or $1,700, in cash.

"(5) That for the purpose of carrying into effect the agreement as so modified, and intending so to do, the defendants conveyed to the plaintiffs, by quitclaim deed, the house and lot referred to, and plaintiffs accepted the same, subject to the said mortgage of $3,400, and the parties mutually signed a contract, bearing date April 8, 1912, for the conveyance of the farm to defendants upon payment of the sum of $1,700, a copy of which contract is set forth in said paragraph 2 of the complaint.

"(6) That said last mentioned contract, by mutual mistake of the parties and by an error of the scrivener, failed to express the true agreement of the parties in that it failed to state that the purchasers were to assume and pay the $1,700 mortgage on said farm, and in that the vendors agreed therein that upon payment to them of $1,700 they would convey said farm to defendants free and clear of incumbrances.

"(7) That in the fall of 1912 the defendants discovered the error in said contract and sought to take advantage thereof and make plaintiffs pay said $1,700 mortgage, and refused on demand to permit said contract to be corrected so as to conform to the real intent and agreement of the parties."

As conclusions: "(1) That there was a mutual mistake on the part of all the parties thereto, in said contract of April 8, 1912, as set forth in the complaint. (2) That the plaintiffs are entitled to a judgment herein reforming and correcting said contract by inserting therein, after the description of the premises contracted to be sold, a clause as follows: 'Said premises are subject to a mortgage held by one T. C. Longwell upon which there remains unpaid the principal sum of $1,700, which mortgage with the accrued interest the parties of the second part are to assume as part of the purchase price;' and further by inserting in said contract, after the words 'free and clear of all legal liens and incumbrances except the taxes herein agreed to be paid by the parties of the second part,' the following: 'and excepting also the $1,700 mortgage now on said premises, which is assumed as aforesaid by the parties of the second part;' also for the costs of the action to be taxed.

"Let judgment be entered accordingly."

William W. Storms, for the appellants.

For the respondents there was a brief by *Simmons & Walker,* and oral argument by *John B. Simmons.*

KERWIN, J. The vital question in this case is whether the findings are supported by the evidence. Counsel for appellants invokes the well settled rule that in order to warrant a court of equity in reforming a contract the evidence must be clear, convincing, and satisfactory.

The question, therefore, arises whether we can say that the proof was not sufficient to satisfy the rule. The trial judge, in a written decision which is part of the record, held that the evidence satisfactorily showed that a mistake had been made in reducing the agreement to writing and that it was not agreed that plaintiffs should assume the $1,700 mortgage.

We are of opinion that the views of the trial judge are correct and the findings well supported by the evidence. The difficulty in the present case is that while the proof is clear, convincing, and satisfactory as to what the agreement was, there was a mistake made in reducing it to writing, so that as written it did not express the agreement of the parties. Under such circumstances a court of equity will reform. *Wis. M. & F. Ins. Co. Bank v. Mann,* 100 Wis. 596, 76 N. W. 777; *Green Bay & M. C. Co. v. Hewitt,* 62 Wis. 316, 21 N. W. 216, 22 N. W. 588; *Lardner v. Williams,* 98 Wis. 514, 74 N. W. 346; *Kropp v. Kropp,* 97 Wis. 137, 142, 72 N. W. 381; *Grant M. Co. v. Abbot,* 142 Wis. 279, 124 N. W. 264; *Whitmore v. Hay,* 85 Wis. 240, 55 N. W. 708; *Lusted v. C. & N. W. R. Co.* 71 Wis. 391, 36 N. W. 857; *Rowell v. Smith,* 123 Wis. 510, 102 N. W. 1.

By the Court.—Judgment affirmed.

ZEMKE, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

September 17—October 5, 1915.

Railroads: Killing of pedestrian on track: Licensees: Contributory negligence.

1. A licensee walking along the track of a railway is bound to exercise ordinary care for his own protection, and contributory negligence on his part will defeat a recovery for injuries caused by negligence of the railway company.

2. Assuming in this case, but not deciding, that a man who, while walking along railway tracks in violation of sec. 1811, Stats., was struck and killed by a switch engine either upon or just after crossing a viaduct, was a licensee and not a mere trespasser, the evidence—showing, among other things, that there were danger signs at both ends of the viaduct and of a nearby railway bridge which deceased had crossed, warning people to keep off the tracks; that there was no room to pass on the bridge or viaduct except in the path of passing trains; that deceased was going north after dark on the track used by north-bound trains; that another switch engine was operating on the south-bound track with the usual noises; that passing trains were frequent and speedy; and that if the deceased had looked to the south before entering upon the viaduct he must have seen the engine in question approaching—is *held* to show, as matter of law, that he was guilty of contributory negligence.
3. The fact that many other persons had traveled along the tracks in the same way was not sufficient to raise an issue on the question of the contributory negligence of the deceased, he having voluntarily and without overmastering necessity exposed himself to great and apparent hazard.

APPEAL from a judgment of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Reversed.*

Edward M. Smart, for the appellant.

William W. Storms, attorney, and *John B. Simmons,* of counsel, for the respondent.

TIMLIN, J. In this action to recover damages under the death statute it appeared that the deceased, while traveling northward upon and lengthwise of the defendant's tracks in the city of Racine, was killed by a locomotive switch engine of the defendant which was being moved northward on the west or left-hand track from Kenosha to Milwaukee. The defendant operates its double-track road by running its north-bound trains on the west or left-hand track and its south-bound trains on the east or left-hand track. For about half a mile southward from the station at Racine the defendant's double tracks are straight and in this distance cross the Root river on a bridge 250 feet long and forty-five feet above the river. The north end of this bridge is 559 feet south of the

south end of the viaduct crossing Sixth street, and the latter viaduct is fifty-one feet north and south and twenty-seven feet in width. The tracks then cross Mound avenue at grade just north of the Sixth-street viaduct and run from thence to Racine station. There are danger signs maintained by it at both ends of Root-river bridge forbidding trespassing and warning people to keep off the tracks, and at both ends of the Sixth-street viaduct and one near the southerly line of Mound avenue. In order to cross Root-river bridge or the Sixth-street viaduct one must go on the track in such a way that he would come in contact with a passing car should there be one. There is no sidewalk, no room, and no provision made for the use of these bridges by persons traveling on the right of way on foot. Notwithstanding these danger signs and the dangerous condition of the bridge and viaduct and the fact that this road extends between the cities of Milwaukee and Chicago and trains thereon are very frequent and run at high speed, many persons have persisted for years in traveling lengthwise on said track from a point south of the Root-river bridge northerly to the Racine station, so that there are paths parallel with or alongside of the track worn by such persons in those places where the traveler could leave the track and walk alongside of it. By irresistible inference the evidence establishes that the deceased was going home from work along this railroad track after dark and was run over and killed either at the north end of the Sixth-street viaduct or thirty feet farther north. At this time another switch engine was switching cars and passing back and forth upon the east track. The locomotive which ran down the deceased was a switch engine, rather poorly equipped with headlights, but not so as to bring it within the statute which required a certain described headlight, because this engine was not the kind of engine there described.

It is a stern rule of law which requires the defendant under such circumstances to treat the deceased as a licensee

notwithstanding the warning notices and the dangerous nature of the place and to exercise ordinary care for his protection. The defendant under such circumstances is required by many cases to do more than post notices warning persons not to use its tracks for the purpose of traveling lengthwise thereon, although what further it should do or could do is not clearly apparent from the cases. This case will be decided upon the hypothesis that the adult deceased was a licensee and that the defendant owed him a duty to keep a diligent lookout so as to give him timely warning by whistle or bell to get off the track, and further that there is evidence that the occupants of the cab on the switch engine in question, namely, fireman, engineer, and pilot, did not exercise due care in maintaining such lookout or give such signals. While not precisely in point the following cases bear on the subject: *Tunnison v. C., M. & St. P. R. Co.* 150 Wis. 496, 137 N. W. 781; *Ulicke v. C. & N. W. R. Co.* 152 Wis. 236, 139 N. W. 189; *Schug v. C., M. & St. P. R. Co.* 102 Wis. 515, 78 N. W. 1090; *Mason v. C., St. P., M. & O. R. Co.* 89 Wis. 151, 157, 61 N. W. 300; *Anderson v. C., St. P., M. & O. R. Co.* 87 Wis. 195, 207, 58 N. W. 79; *Davis v. C. & N. W. R. Co.* 58 Wis. 646, 17 N. W. 406; *Townley v. C., M. & St. P. R. Co.* 53 Wis. 626, 11 N. W. 55; *Johnson v. C. & N. W. R. Co.* 56 Wis. 274, 14 N. W. 181; *Whalen v. C. & N. W. R. Co.* 75 Wis. 654, 44 N. W. 849; *Great Northern R. Co. v. Thompson,* 199 Fed. 395, 47 L. R. A. N. S. 506; *Fearons v. Kansas City E. R. Co.* 180 Mo. 208, 79 S. W. 394.

Without conclusively deciding that under the circumstances of this case the adult deceased was a licensee instead of a trespasser, the hypothesis above stated will serve for the disposition of the case on another ground. For, assuming that the deceased was a licensee and that the company owed him a duty to exercise ordinary care to the extent that such duty is due licensees, nevertheless the licensee also owes himself the correlative duty to exercise ordinary care for his own

protection. By sec. 1811, Stats. 1913 (see Wis. Annotations), in force when the deceased met his death, it is made unlawful for any person other than those connected with or employed upon the railroad to walk along the track of any railroad except when such road shall be laid along public streets. See, also, sec. 4635, Stats.

Assuming that this alone would not charge the plaintiff with contributory negligence (cases *supra*), still it goes a long way in that direction. Add to this the danger signs mentioned above. Add to this the Root-river bridge and the viaduct over which there was no room to pass except in the path of a passing train. Next, the fact that it was after dark and that the deceased was traveling northward on the west track and that trains running north, consequently coming up behind him, ran on this track, and that another switch engine was operating on the east track with the usual noises; then, that the track in question was between the populous cities of Chicago and Milwaukee, that passing trains were numerous, frequent, and speedy. Add to this the evidence on the part of the plaintiff that the switch engine in question was running at the rate of twenty-five miles an hour and that the deceased was walking. The engine was moving then about eight times as fast as the deceased. Therefore, when the deceased reached the south end of the Sixth-street viaduct the engine was approximately 357 feet behind him and moving toward him. If it overtook him thirty feet further north, then when he reached the south end of the viaduct it was about 559 feet behind him and just leaving Root-river bridge. Had he turned and looked back in the direction of approaching trains he must have seen this engine before entering upon the viaduct. Failing to look back under such circumstances before entering upon this viaduct, particularly in the presence of the switching engine on the east track with its noises, was a negligent act. Looking back and proceeding with an approaching engine 357 or 559 feet be-

hind him and taking his chances of crossing the viaduct ahead of it was a negligent act. He was run down and killed either just at the north end of this viaduct or thirty feet farther north. If he was thirty feet farther north he had opportunity to step out from between the tracks. But critical and detailed investigation of his acts, while it makes his negligence more apparent, does not seem to be necessary. No man could walk along this track under the circumstances stated without a consciousness that he was exposing himself to danger unless he were wholly absent-minded. This conscious and voluntary exposure to danger or this inexcusable absent-mindedness in the presence of apparent danger is contributory negligence. It is thought in some of the cases that contributory negligence established in this way is rebutted by showing that many other persons traveled along the tracks in the same way. *Townley v. C., M. & St. P. R. Co.* 53 Wis. 626, 11 N. W. 55.

This is not ordinarily the way to rebut a charge of negligence. But, assuming that this proof has such tendency, we think the particular situation and circumstances attending the injury may be such that the example of others taking the like risk may be wholly insufficient to raise an issue on the question of contributory negligence. Where the act is manifestly dangerous and there is no overmastering necessity requiring that such act be done, the fact that others had the hardihood or the carelessness which prompted them to take the same risk cannot be taken to authorize the injured party to voluntarily expose himself to great and apparent hazard and yet recover for the injuries sustained by him in direct consequence of such exposure. It is considered that the question of contributory negligence is so plain in this case and so well established as to require an affirmative finding by the court upon the undisputed evidence on this point.

By the Court.—Judgment reversed, and the cause remanded with directions to dismiss the complaint.

WAGNER, Administratrix, Respondent, vs. RACINE COUNTY, imp., Appellant.

September 17—October 5, 1915.

Appealable orders: Consolidation of actions.

An order consolidating actions is not appealable. *Winninghoff v. Wittig*, 64 Wis. 180, overruled.

APPEAL from an order of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Dismissed.*

William W. Storms, district attorney, for the appellant.

For the respondent there was a brief by *George W. Waller,* attorney, and *Simmons & Walker,* of counsel, and oral argument by *John B. Simmons.*

BARNES, J. Two actions were pending in the circuit court for *Racine County* to recover damages for the death of one Wagner, one against the T. L. Smith Company and the other against *Racine County.* It is the contention of the plaintiff that the defendants in said actions were joint tortfeasors and that Wagner's death was proximately caused by the concurring negligence of both defendants. On plaintiff's motion the two actions were consolidated, and the defendant *Racine County* appeals from the order of consolidation.

If the order is appealable it must be because of the provisions contained in sub. (1) of sec. 3069, Stats. No other part of the section could possibly be applicable. The order is not appealable under sub. (1). It is only an order affecting a substantial right, "when such order in effect determines the action and prevents a judgment from which an appeal might be taken," that is made appealable by said subdivision. If it should be conceded that the order in question affects a substantial right, which is, to say the least, doubtful, we fail to see how it can possibly be said that this order either deter-

mined the action or prevented a judgment from which an appeal might be taken. The action against *Racine County* is still pending; so it is not determined, and after the action is tried a judgment may be entered from which an appeal can be taken. Two essential conditions to the appealability of an order under sub. (1) are lacking. It follows that if the statute means what it says the appeal cannot be entertained.

The appellant does not attempt to argue that the order is one which falls within the class of orders made appealable by sec. 3069. It does that, however, which is ordinarily more efficacious than mere argument, it points us to one of our former decisions in which just such an order was held appealable. *Winninghoff v. Wittig,* 64 Wis. 180, 24 N. W. 912. It is also true that the court entertained appeals from orders of this kind in other cases where the question of appealability was not raised or considered by the court.

It would be interesting to know by what process of reasoning the court reached its conclusion in the *Winninghoff Case.* It was clearly of the opinion that the order was appealable, and this is all that is said about it. The statute has been changed since this case was decided, by eliminating what was sub. 4 of sec. 3069, R. S. 1878, but it is difficult to see how the change accounts for the conclusion reached in the case under discussion. The repealed provision made an order which involved the merits of an action or some part thereof appealable, but the order could hardly have been held appealable under such a proviso, inasmuch as the merits of the action would not appear to have been involved. The briefs in the *Winninghoff Case* do not help us very much. The only reference to the question is the following: "The order appealed from is not appealable because it is an intermediate order which does not affect any substantial right of the appellant." Counsel seemed to think that if a final order affected a "substantial right" it was appealable. Possibly the

court for some reason entertained the same view. This is only one of several requirements of the statute which must exist to make the order appealable. We think the case of *Winninghoff v. Wittig* was not correctly decided and that it countenances a rule of practice contrary to our statute law and calculated to promote delays in the trials of lawsuits and to increase the expenses thereof to suitors. The case is therefore overruled.

By the Court.—Appeal dismissed.

HORLICK, Respondent, vs. TOWN OF MOUNT PLEASANT, Appellant.

September 17—October 5, 1915.

Taxation of incomes: Action to recover illegal taxes: Conditions precedent: Appeal to tax commission.

1. The remedy by appeal to the state tax commission, given by sec. 1087*m*—19, Stats., to a person dissatisfied with any determination of the county board of review in respect to the assessment of his income, is not exclusive nor is such an appeal a condition precedent to the right to maintain an action for the recovery of illegal income taxes paid under protest. Such action may be maintained under sub. (4), sec. 1087*m*—22, and sec. 1164.
2. The legislature having in sec. 1087*m*—18, Stats., expressly provided that the presentation of objections to the county board of review shall be a condition precedent to the right to maintain an action to question any assessment of income, no other conditions should be implied, where neither the situation presented nor the language of the statute unmistakably calls for implied conditions.

APPEAL from an order of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Affirmed.*

Plaintiff for the year 1912 made an income return showing a net income of $53,648.01, upon which sum the assessor of incomes assessed his income tax. The board of review no-

tified him that they proposed to raise the assessment. He appeared before the board through his son and made full disclosure under oath as required by law. The board raised the assessment to $310,699.02 and the plaintiff paid the tax in excess of that upon an income of $53,648.01 under protest, claiming that the board of review had no lawful ground for raising the assessment. In this action, brought under sec. 1164, Stats. 1913, he seeks to recover the illegal excess paid, amounting to $15,731.52. To a complaint setting up these and other facts essential to a recovery the defendant demurred on the ground that the complaint failed to state facts sufficient to constitute a cause of action, in that it did not allege that plaintiff took an appeal from the assessment of the board of review to the state tax commission as provided by sec. 1087*m*—19. From an order overruling the demurrer the defendant appealed.

For the appellant there were briefs by *William W. Storms,* attorney, and the *Attorney General* and *Walter Drew,* deputy attorney general, of counsel, and oral argument by *Mr. Storms* and *Mr. Drew.*

For the respondent there was a brief by *Miller, Mack & Fairchild,* and oral argument by *E. C. Mack.*

VINJE, J. The question presented by this appeal is whether an action to recover an illegal income tax paid under protest may be maintained without an appeal having been taken from the assessment of the board of review to the state tax commission as provided in sec. 1087*m*—19, Stats. Sub. 1 of that section reads:

"Any person dissatisfied with any determination of the county board of review may appeal within twenty days to the state tax commission, to whom a copy of the record of the board shall be certified, together with all evidence or a copy thereof, relating to such assessment."

The defendant contends that the remedy given by this section is exclusive and that a compliance with its provisions is

a condition precedent to the right to maintain any action or proceeding for the recovery of illegal income taxes.

The solution of the question raised depends upon the construction to be given to several sections of the Income Tax Law in addition to the section quoted. Sec. 1087*m*—18 provides:

"No person subject to assessment by the county assessor shall be allowed in any action or proceeding to question any assessment of income, unless objections thereto shall first have been presented to the county board of review in good faith and full disclosure made under oath of any and all income of such party liable to assessment."

In sub. (4), sec. 1087*m*—22, it is provided that "All laws not in conflict with the provisions of this act, relating to the assessment, collection and payment of taxes on personal property, the correction of errors in assessment and tax rolls, the compromise or cancellation of illegal taxes and the refund of moneys paid thereon, shall be applicable to the income tax herein provided for."

The substance of the defendant's argument is that the Income Tax Law provides for a complete scheme of taxation, and that such scheme must be followed and exhausted before recourse can be had to the courts; that the remedy given by it is exclusive, and, if not pursued as far as it permits, then a resort to the courts is in conflict with its provisions because it provides a different remedy, namely, in this case, an appeal to the state tax commission instead of an action in court. It is also urged that it was the legislative scheme to vest jurisdiction in the first instance in the commission created to administer the law, to the end that a cheap and speedy remedy could be had and the law harmoniously construed by a single body—the commission—instead of by the different circuit courts of the state. If such was the legislative intent, then it should control the construction to be given the sections quoted and the remedy given by the Income Tax

Law should be held to be exclusive and to be a condition precedent to the right to maintain an action for the recovery of illegal taxes. *State ex rel. Superior v. Duluth St. R. Co.* 153 Wis. 650, 142 N. W. 184.

While it must be conceded that there is much force in the argument of defendant, still we think the legislative language is so certain and explicit upon the subject that no serious doubt can be entertained as to its intent. In sec. 1087*m*—18 the condition precedent to the right to maintain an action or proceeding to question any assessment of income is specifically stated. Such condition is that the person questioning the assessment must have presented his objections to the board of review in good faith and made a full disclosure under oath of all his income. The legislature having expressly spoken upon the subject of conditions precedent to the right to maintain an action, no other conditions than those named should be implied unless the language or the situation presented is such as to unmistakably call for implied conditions. *Expressio unius est exclusio alterius.* Neither the situation presented nor the language of the statute requires resort to implied conditions precedent. The remedy by action is a well recognized one in this state and is expressly granted by sec. 1164, Stats. 1913. It should not be taken away from the taxpayer except by a clear legislative mandate. *Milwaukee v. Wakefield,* 134 Wis. 462, 113 N. W. 34, 115 N. W. 137.

The appeal to the state tax commission provided for in sec. 1087*m*—19 is permissive merely. The language of the section contains no intimation that unless it is taken there can be no redress in the courts. In the very preceding section the legislature has spoken on the subject of conditions precedent to the right to maintain an action. If the permissive appeal to the tax commission had been thought to be one, it is strange that no direction to that effect was made when the subject was fresh in the minds of the lawmakers.

Of course the language granting the right of appeal could not be mandatory. If it were it would compel an aggrieved taxpayer to take an appeal whether or not he wanted to further insist upon the objections. This the legislature naturally did not wish to do, so the language used had to be permissive in form and the word "may" suitably expressed the idea. The word "must" was clearly an improper word to use. So no particular force can be given to the mere permissive form of the language used in providing for the appeal. But the fact that no suggestion was made in the language granting it that the appeal was a condition precedent to the right to maintain an action in court is highly significant when it is borne in mind that the section giving the right to appeal follows the one providing for a condition precedent. Such omission must be held to indicate a legislative intent that an action may be maintained without taking an appeal.

By the Court.—Order affirmed.

VENNEN, Administratrix, Appellant, vs. NEW DELLS LUMBER COMPANY, Respondent.

September 16—October 26, 1915.

Workmen's compensation: Statute construed: "Accident:" "Personal injury:" Typhoid fever.

1. An employee who, as the result of drinking polluted water furnished by the employer at its factory, became sick with typhoid fever, was at the time of such injury "performing service growing out of and incidental to his employment," within the meaning of sec. 2394—3, Stats.
2. A personal injury "accidentally sustained" or "proximately caused by accident," within the meaning of sec. 2394—3, Stats., may be one which resulted from carelessness or negligence. The words should be given, as intended by the legislature, their popular meaning.

3. Typhoid fever contracted by an employee as the result of drinking polluted water furnished by the employer is a "personal injury accidentally sustained" and "proximately caused by accident," within the meaning of sec. 2394—3, Stats.

BARNES, J., dissents.

APPEAL from an order of the circuit court for Eau Claire county: E. C. HIGBEE, Judge. *Affirmed.*

This is an action to recover damages alleged to have been sustained by the plaintiff as administratrix of her husband's estate and as his widow on account of her husband's death.

The defendant is a corporation organized under the laws of the state of Wisconsin. The deceased, Gerhard Vennen, was employed by the defendant during the spring and early summer of the year 1914. The defendant was engaged in operating a manufacturing lumber establishment located on the Chippewa river in the city of Eau Claire, Wisconsin. In connection with its establishment the defendant maintained an outhouse and two toilets for its employees working there and a toilet in its principal office building. All of the sewage from these toilets was discharged into the river near defendant's establishment. The pleadings allege that the defendant in supplying water for its boilers not only secured water from the city waterworks, but also used water from the river, which was obtained by means of intake pipes; that the defendant was negligent in placing its intake pipes in such location that they carried into the boilers water that was contaminated by the sewage, and that this water through defendant's negligence became mixed with the water from the city waterworks because of improper connecting pipes. It is further alleged that the defendant negligently permitted and caused the employees to drink of this polluted water and thereby caused the deceased, Gerhard Vennen, to become sick with typhoid fever, which resulted in his death on July 25, 1914.

The defendant alleges and claims that the court had no jurisdiction of the matter because the defendant at the time

here in question had more than four employees engaged in a common employment and that it had filed notice of election to accept the provisions of the Workmen's Compensation Act, and that the plaintiff's intestate had never filed any election not to accept the provisions thereof.

Plaintiff demurred to this defense on the ground that it did not state facts sufficient to constitute a defense. The circuit court ordered that the demurrer be overruled. From such order this appeal is taken.

For the appellant there was a brief signed by *Fred Arnold,* attorney, and *Daniel H. Grady,* of counsel, and oral argument by *Mr. Grady.*

For the respondent there was a brief by *Sturdevant & Farr,* and oral argument by *L. M. Sturdevant.*

Siebecker, J. This appeal presents an important question as to the liability and nonliability of employers under the provisions of the Workmen's Compensation Act. The ruling upon the demurrer to the answer assumes that the facts stated in the pleading exist as alleged, regardless of evidence in respect thereto. Sub. (3), sec. 2394—3, Stats., provides that where the right to compensation under the provisions of the Workmen's Compensation Act exists for personal injury or death, it shall be the exclusive remedy against the employer for such injury or death. *Milwaukee v. Althoff,* 156 Wis. 68, 145 N. W. 238; *Smale v. Wrought Washer M. Co.* 160 Wis. 331, 151 N. W. 803.

By sec. 2394—3 it is enacted:

"Liability for the compensation hereinafter provided for, in lieu of any other liability whatsoever, shall exist against an employer for any personal injury accidentally sustained by his employee, and for his death, in those cases where the following conditions of compensation concur: . . .

"(2) Where . . . the employee is performing service growing out of and incidental to his employment. . . .

"(3) Where the injury is proximately caused by accident, and is not intentionally self-inflicted."

The facts alleged show that the parties to the action were subject to the Compensation Act. The inquiry then is, Was Vennen's death proximately caused by accident while he was "performing service growing out of and incidental to his employment"? The inference from the alleged facts is reasonably clear that Vennen at the time of the alleged injury resulting in his death was "performing service growing out of and incidental to his employment." The contention that an injury resulting from carelessness or negligence is not one that can be said to have been accidentally sustained in the sense of the Compensation Act is not well founded. As declared in *Northwestern Iron Co. v. Industrial Comm.* 154 Wis. 97, 142 N. W. 271, "In giving construction to such statutes words are to be taken and construed in the sense in which they are understood in common language, taking into consideration the text and subject matter relative to which they are employed." The words should be given, as intended by the lawmakers, their popular meaning. *Sadowski v. Thomas F. Co.* 157 Wis. 443, 146 N. W. 770. "A very large proportion of those events which are universally called accidents, happen through some carelessness of the party injured, which contributes to produce them. . . . Yet such injuries, having been unexpected and not caused intentionally or by design, are always called accidents, and properly so." Accidents without negligence are rare as compared to accidents resulting from negligence. Opinion of PAINE, J., in *Schneider v. Provident L. Ins. Co.* 24 Wis. 28. The intention of the legislature to include accidental injuries resulting from negligence within the language of the Compensation Act is so manifest that there is no room to indulge in construction of the language employed. In the popular sense the words as used in the Compensation Act, referring to a

personal injury accidentally sustained by an employee while performing services growing out of and incidental to his employment, include all accidental injuries, whether happening through negligence or otherwise except those intentionally self-inflicted.

The inquiry is, Was the disease from which it is alleged Vennen died proximately caused by accident? Do the facts and circumstances alleged in the case set forth the conditions to entitle an employee to compensation "for any personal injury accidentally sustained" which was "proximately caused by accident" while "performing service growing out of and incidental to his employment"? We have already noticed that the alleged injury was, under the facts stated in the pleadings, received by deceased while in plaintiff's employ and while he was "performing service growing out of and incidental to his employment." Whether or not the alleged accidental injury caused Vennen's death is sufficiently pleaded and remains a question for determination from the evidence at the inquest of the case. There remains the important inquiry, Do the allegations state a case showing that Vennen's death is attributable to "accident" in the sense of the Compensation Act? It is urged that the contracting of typhoid disease, under the facts and circumstances stated, does not show that his death was due to an accidental occurrence. The term "accidental," as used in compensation laws, denotes something unusual, unexpected, and undesigned. The nature of it implies that there was an external act or occurrence which caused the personal injury or death of the employee. It contemplates an event not within one's foresight and expectation, resulting in a mishap causing injury to the employee. Such an occurrence may be due to purely accidental causes or it may be due to oversight and negligence. The fact that deceased became afflicted with typhoid fever while in defendant's service would not, in the sense of the statute, constitute a charge that he sustained an accidental injury, but the allegations go

further and state that this typhoid affliction is attributable to the undesigned and unexpected occurrence of the presence of bacteria in the drinking water furnished him by the defendant as an incident to his employment. These facts and circumstances clearly charge that Vennen's sickness was the result of an unintended and unexpected mishap incident to his employment. These allegations fulfil the requirements of the statute that the drinking of the polluted water by the deceased was an accidental occurrence while he was "performing service growing out of and incidental to his employment." It is alleged that the consequences of this alleged accident resulted in afflicting Vennen with typhoid disease, which caused his death. Diseases caused by accident to employees while "performing service growing out of and incidental to his employment" are injuries within the contemplation of the Workmen's Compensation Act. This was recognized in the case of *Heileman B. Co. v. Industrial Comm.*, *ante*, p. 46, 152 N. W. 446, and *Voelz v. Industrial Comm.*, *ante*, p. 240, 152 N. W. 830. The English Compensation Act made employers liable to employees for "personal injury by accident arising out of and in the course of the employment." Under this act it has been held that contraction of a disease may be caused by accident. See the following cases: *Brintons v. Turvey*, [1905] A. C. 230. A workman became infected through a bacillus from the wool which he was assorting, resulting in giving him the disease of anthrax of which he died, and it was held that it was a case of "injury by accident." *Alloa C. Co. v. Drylie*, [1913] 1 Scots L. T. 167, 4 N. & C. C. A. 899. Drylie, a workman in a coal pit, through accident was exposed to icy cold water up to his knees and became chilled which made him sick, resulting in pneumonia of which he died. Upon the evidence adduced the court found that the pneumonia was caused by the chill and that death resulted from "injury by accident." The cases wherein liability has been found distinguish between

disease resulting from accidental injury and disease which results from an idiopathic condition of the system and not attributable to some accidental agency growing out of the employment. The latter class of diseases are held not to be within the contemplation of the act.

We are of the opinion that the decision of the trial court holding that the facts pleaded show that Vennen's death was caused by accident while performing service growing out of and incidental to his employment is correct and that the demurrer was properly overruled.

By the Court.—The order appealed from is affirmed.

Barnes, J. (*dissenting*). By sec. 2394—3 liability exists under the Compensation Act, where employer and employee are under it, (1) for "any *personal injury* accidentally sustained" by the employee while "performing service growing out of and incidental to his employment, . . . where the injury is proximately caused by accident, and is not intentionally self-inflicted," and (2) for death where the employee is performing such service and where the injury causing death is "proximately caused by accident" and not intentionally self-inflicted.

To justify recovery under this statute, where death does not ensue, there must be a *personal injury actually sustained,* which injury is proximately caused by accident. Where recovery is sought for death, the statute does not in express terms say that a personal injury must actually be sustained, but only that there must be an injury "caused by accident."

I think it is very improbable that the legislature intended to give compensation where death resulted from an accident and deny it in case of mere disability, and that by fair implication it was intended to allow compensation for death only where it resulted from "personal injury." In other words, if recovery can be had in case of death from typhoid fever, then indemnity should be allowed for disability and

medical attendance in case of recovery. If this be so, then two things must occur as a condition precedent to recovery: there must be a personal injury and it must be caused by accident. If the taking of typhoid germs into the system is a "personal injury" and an "accident" within the meaning of the law, then the decision is right. If there can be a recovery in the case of typhoid fever, then the same result would follow for tuberculosis, pneumonia, smallpox, anthrax, ordinary colds, and other diseases, where the sick employee was able to trace the cause of his sickness to some unusual conditions in the surroundings in which he worked. If I understand the opinion correctly, most if not all diseases may be accidental, and recovery may be had on account of the same, except those of an "idiopathic" character. Idiopathy is defined as "a morbid state or condition not preceded and occasioned by any other disease; an individual or personal state of feeling; a mental condition peculiar to one's self." Idiopathic is defined as "of or pertaining to a morbid state; not secondary or arising from any other disease; as an idiopathic affection." Cent. Dict.

The peculiar concern of this court is to get at the legislative intent. When the court ascertains that intent, it has not only performed its full duty but has exhausted its legitimate powers. It has no right to curtail or extend the provisions of any statute.

The Compensation Act as now construed by the court will, I think, add materially to the liabilities popularly supposed to exist under the act, if it does not double them. If the legislature so intended, well and good. I cannot bring myself to believe that it did so intend.

It is a matter of common knowledge that cases of sickness and disease are much more numerous than cases of what are commonly known as accidents. The Compensation Act was passed after an exhaustive study of the subject of industrial insurance by a committee of the legislature which covered a

period of two years. There were two classes of acts in operation in other jurisdictions, one covering diseases and accident, the other, not in terms at least covering disease. If it had been the purpose of the legislature to include the large class of cases that would result from sickness, it is fair to presume that it would have done so in express and unmistakable terms, and not by the use of language that is at least popularly understood not to include them. In the numerous discussions on the proposed law before the legislature, which are fresh in mind, it does not appear to have occurred to any one that diseases were included or intended to be included. In the four years that have elapsed since the original act was passed thousands of cases of sickness other than those of an "idiopathic" character must have arisen where there was ground for claiming that the sickness was contracted in the course of employment, and yet this is the first case where the claim was made that the Compensation Act applies to sickness. Even the representative of the deceased is not making such a claim here. On the contrary she is resisting it and insisting that she is free to pursue her common-law remedy.

Now the words "personal injury" are words commonly and ordinarily used to designate injury caused by external violence, and they are not used to indicate disease. Neither do we speak of sickness as an "accident" or an "injury." When we hear that someone has suffered an accident we at once conclude that he has suffered some more or less violent external bodily injury. It is in this sense, I think, that the words "personal injury" and "injury . . . caused by accident" are used in the statute. When our neighbor has typhoid fever, we do not think of classifying his ailment as an "accident," an "injury," or a "personal injury." It is only by an extremely far fetched and I believe illogical construction of the words referred to that they can be held to include disease not resulting from some external violence.

It is well nigh a demonstrable certainty that the legislature

never intended to provide compensation for sickness not resulting from external bodily violence. Wisconsin was one of the pioneers in this kind of legislation. It was known that it would entail large burdens on our manufacturers, who would thus be placed at a disadvantage in competing with employers in other states where no such law was then in existence. The law was an optional one and is so yet. As was expected, there was a great deal of hesitancy on the part of employers about coming under it. Had it been supposed that it provided compensation for disease or sickness, it is probable that the purpose of the law would have been practically nullified. The effect of the decision in this case is of course conjectural, but it is not without the range of possibilities that some at least of those who are now under the act will exercise their election not to remain under it. It is now a generally accepted truism that many diseases attack those who are physically weak and run down rather than those who are strong and able to throw off unwelcome disease germs. The weak must work as well as the strong or else be taken care of by the public, and should they be discriminated against in the matter of securing employment much harm would follow. The question whether we should or should not have insurance against sickness is one of legislative policy. The manner of paying such insurance, if decided upon, is also a question of legislative policy within constitutional limits. I do not question the power of the legislature to pass an option law such as we have providing for indemnity against disease. What I do say is, that the legislature has not done so, and that the act passed has been stretched by construction so as to add to it, in all probability, as large a class of claims and liabilities as that actually included in the original act.

The great weight of authority is contrary to the decision in this case. In *Fenton v. Thorley & Co.* [1903] A. C. 443, it is said that the words "by accident" are used to qualify the word "injury," confining it to certain classes of injuries

and excluding other classes, as, for instance, injuries by disease or injuries self inflicted by design. In *Broderick v. London County Council,* [1908] 2 K. B. 807, 15 Am. & Eng. Ann. Cas. 885, the inhalation of sewer gas by which an employee contracted enteritis was held not to be a personal injury by accident. Paralysis resulting from exposure to contact with lead was held not to be an injury caused by accident. *Steel v. Cammell, L. & Co.* [1905] 2 K. B. 232, 2 Am. & Eng. Ann. Cas. 142. An abscess in the hand produced by continuous rubbing of a pick handle held not to be an injury produced by accident. *Marshall v. East Holywell C. Co.* 93 L. T. Rep. 360. Working with a blistered finger among red lead and oil which produced an inflammation and swelling not an injury produced by accident. *Walker v. Lilleshall C. Co.* [1900] 1 Q. B. 488. Copper poisoning resulting from contact with dust produced by filing is not an injury produced by accident. *Hichens v. Magnus M. Co.* 35 N. J. Law J. 327. Death from anthrax from handling animals that died from this disease held not injury caused by accident. *Sherwood v. Johnson,* 5 Butterworth's Workm. C. C. 686.

The Michigan court has held that since an accident is an unforeseen event occurring without design, the Compensation Act of that state (which is similar to ours on the point under discussion) does not cover occupational diseases, which are diseases arising from causes incident to certain employments. *Adams v. Acme W. L. & C. Works,* 182 Mich. 157, 148 N. W. 485.

Kindred cases dealing with the subject under consideration have arisen under policies of accident insurance. They hold that disease not resulting from or produced by external violence is not an accident for which recovery can be had under such contracts. *Bacon v. U. S. Mut. Acc. Asso.* 123 N. Y. 304, 25 N. E. 399; *Smith v. Travelers Ins. Co.* 219 Mass. 147, 106 N. E. 607; *Sinclair v. Maritime P. A. Co.*

107 Eng. C. L. 478; *Dozier v. Fidelity & C. Co.* 46 Fed. 446.

By sec. 2394—11, Stats., it is provided that no claim to recover compensation under secs. 2394—3 to 2394—31, inclusive, shall be maintained unless, within thirty days after the occurrence of the accident which is claimed to have caused the injury or death, notice in writing be given to the employer stating the time and place of the injury. This must mean that the legislature had in mind something definite and tangible, something that could be located as to time and place, where it used the word "accident." I do not see how this statute can be complied with in a typhoid fever case.

The New Jersey court, following what it conceives to be the English rule, holds that "where no specific time or occasion can be fixed upon as the time when the alleged accident happened, there is no injury by accident within the meaning of the compensation act." *Liondale B., D. & P. Works v. Riker,* 85 N. J. Law, 426, 89 Atl. 929.

The latest expression of the English courts on the subject to which attention has been called is *Eke v. Hart-Dyke,* [1910] 2 K. B. 677. There a laborer died from ptomaine poisoning caused by the inhalation of sewer gas. It was held that this was not an injury caused by accident, one of the concurring judges saying that there could be no recovery for injury by accident where you cannot give a date, and adding: "It is hardly a lawyer's question."

The *Brintons Case* (*Brintons v. Turvey,* [1905] A. C. 230) cited in the majority opinion is discussed in *Eke v. Hart-Dyke,* where it is referred to as an extreme case, the logic of which could be approved only on the theory that the anthrax germ which was floating in the air and which lodged in the eye of the deceased produced an abrasion which developed infection. In the decision the case is compared with a spark flying from an anvil and injuring the eyesight.

The Scotch case cited in the opinion (*Alloa C. Co. v. Dry-*

lie, [1913] 1 Scots L. T. 167, 4 N. & C. C. A. 899) is authority for affirming the decision in the present case, but is much more restricted in its application than is the present decision. The opinion of Lord Dundas, which was concurred in by a majority of the judges, states:

"The present case could never be fairly cited in the future as indicating that the court is willing to hold that a mere ordinary disease (*e. g.* pneumonia) entitles a workman to compensation. The court must be satisfied . . . that the disease was attributable to some particular event or occurrence of an unusual and unexpected character incident to the employment, which could, in the light of the decisions, be fairly described as an accident."

I think this is the only decided case to which attention has been called which tends to support the decision of the court, while the cases to the contrary are numerous. In the two Wisconsin cases cited the disease for which recovery was allowed was proximately caused by an injury resulting from external violence.

Gimbel Brothers, Incorporated, and others, Respondents, vs. Tolman and wife, Appellants.

October 5—October 26, 1915.

Reformation of lease: Mistake: Evidence: Laches.

1. A finding of the trial court that by mutual mistake of the parties there was a misdescription of the premises intended to be covered by a lease is *held* to be sustained by the evidence.
2. Delay in commencing an action for correction of the misdescription of premises in a lease did not constitute laches where plaintiff was in peaceable possession of the disputed premises, with defendants' consent, and the rights of innocent parties were in no way prejudiced.

Appeal from a judgment of the circuit court for Milwaukee county: F. C. Eschweiler, Circuit Judge. *Affirmed.*

This is an action to reform a lease covering a portion of a city block in the city of Milwaukee, on the ground of an alleged mutual mistake in the description of the premises.

At the time the lease was executed defendant *Tolman* was the owner of the property in question. The deed by which he acquired title thereto describes the property by lots, in block 69, according to the recorded plat of the city of Milwaukee. In July, 1902, *Tolman* and wife made this contract with the individual plaintiffs, leasing a part of the property *Tolman* owned in this block, describing it by metes and bounds. According to this description the lease encroached seven tenths of a foot on the Third street frontage and five tenths of a foot on the Grand avenue frontage of the property adjoining the leased premises and known as the Matthews building, and according to the claim of the plaintiffs omitted therefrom a strip seven tenths of a foot wide fronting on Third street and lying along the southerly side of the northeast quarter of the block and extending from Third street to the north and south center line of this block. Under the lease the plaintiffs have occupied all of the property in the northeast quarter of block 69, except the part occupied by the Matthews building, from the date of the lease to the present time.

The trial court found that it was the intention of the parties to have the lease cover all of the northeast quarter of block 69 except the part known as the Matthews building, and awarded judgment for the reformation of the description of the premises leased to conform to the understanding and intention of the parties. From such judgment this appeal is taken.

For the appellants there were briefs by *Charles F. Fawsett* and *Fordyce H. Bottum,* and oral argument by *Mr. Fawsett.*

For the respondents there was a brief by *Glicksman, Gold & Corrigan,* attorneys, and *George B. Luhman,* of counsel, and oral argument by *Nathan Glicksman.*

Siebecker, J. By the lease in question the defendant *Tolman* and wife leased the premises owned by *Tolman* in the northeast quarter of block 69 pursuant to the recorded plat and the description thereof in the conveyances by which *Tolman* acquired title. The court found that the parties to the lease believed and understood that the occupation and use of the northeast quarter of this block, with respect to street and lot lines, conformed to the measurements as shown by the recorded plat, and that the distance from the boundary line between Grand avenue and the ground occupied by the Matthews building to the dividing line between the southerly wall of the Davidson Theater Annex building and the ten-foot passageway adjacent thereto was 205 feet, and that the distance from the boundary line between Third street and the lands abutting thereon as occupied by buildings in the northeast quarter of this block to the center line of the north and south alley as platted and subsequently vacated was 160 feet; and that the parties understood said dimensions embraced and correctly described the northeast quarter of block 69; that the parties to this lease intended and understood that the description set forth in this lease was to cover and include all of the premises owned by the lessor, *Tolman,* in the northeast quarter of this block, excepting the part known as the Matthews building. The evidence abundantly sustains these findings of fact. It is without dispute that the description in the lease does not correctly describe the premises the lessor *Tolman* owned in the northeast quarter of block 69, which the parties intended to cover and include in the lease. That Mr. Smith, the original lessee's representative, believed and understood that the lease in question was to cover and include all of the property *Tolman* owned in the northeast quarter of this block, is clearly inferable from the facts and circumstances shown by the evidence. It is manifest from the transaction between Smith and *Tolman* that they both contemplated and intended that the

courses and distances embraced in the description in the lease included all the property *Tolman* owned in this quarter of the block. A potent and convincing undisputed fact, which supports the court's conclusions upon the evidence, is the entry and occupancy by the plaintiffs under the lease of the premises embraced in the corrected description. This entry and occupancy of the premises was with defendants' consent and has continued to the present time. It seems clear that the parties made a mutual mistake in describing the premises intended to be included in the lease.

The postponement by the plaintiffs to institute an action for the correction of the misdescription did not operate to the prejudice of innocent parties, and is barren of the element of laches so far as the defendants are concerned. *Schuster v. Milwaukee E. R. & L. Co.* 142 Wis. 578, 126 N. W. 26; *Ludington v. Patton,* 111 Wis. 208, 86 N. W. 571.

Nor can laches be imputed to plaintiffs under the circumstances showing that they have been in peaceable possession of the disputed premises with the defendants' consent. *Schroeder v. Smith,* 249 Ill. 574, 94 N. E. 969; *Wykle v. Bartholomew,* 258 Ill. 358, 101 N. E. 597; *Carr v. Burris,* 148 Ky. 232, 146 S. W. 424.

The court properly awarded judgment for reformation of the description contained in the lease.

By the Court.—The judgment appealed from is affirmed.

BALLARD, Respondent, vs. THOMAS FURNACE COMPANY, Appellant.

October 6—October 26, 1915.

Master and servant: Injury: Insecure path: Contributory negligence: Question for jury.

In an action for injuries to an employee contributory negligence was a jury question upon evidence showing, among other things, that as he was walking in defendant's factory along a narrow path constructed of a thin coating of concrete laid on ashes, close to the edge of which was an excavation, the bank caved away causing him to fall into the excavation, that for weeks he and others had walked over the path safely, and that he knew of the excavation and of the thinness of the concrete, but not showing that he knew or even suspected the insecure condition of the bank under the concrete.

APPEAL from an order of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Affirmed.*

This is an action for personal injury begun in the civil court of Milwaukee county. At the close of the evidence the court, upon motion of the defendant, directed a verdict in its favor on the ground that the evidence showed as a matter of law that plaintiff was guilty of contributory negligence. Plaintiff's counsel moved to reopen the case for the admission of further testimony to show that plaintiff was unable to see clearly without his glasses, and that at the time of his injury he was not wearing his glasses, and to clear up certain ambiguity as to how the accident really happened. The motion was denied. Afterwards the civil court, upon motion of plaintiff, set aside the verdict and granted a new trial. Upon appeal to the circuit court, and after a hearing therein, it entered an order affirming the order of the civil court granting a new trial. From such order of the circuit court the defendant appealed.

For the appellant there was a brief by *Doe, Ballhorn &*

Wilkie, and oral argument by *Harold M. Wilkie* and *J. B. Doe.*

For the respondent there was a brief by *Cochems & Wolfe* and *P. C. Kolinski,* and oral argument by *H. O. Wolfe.*

VINJE, J. The defendant concedes there is evidence sufficient to go to the jury as to negligence on its part, but it claims that the evidence conclusively shows contributory negligence on the part of the plaintiff and therefore the court erred in setting aside the verdict and granting a new trial. We shall assume that the civil court did not grant a new trial on the ground that it erred in not reopening the case, but that the new trial was granted because contributory negligence was a jury question.

Plaintiff, who was a carpenter about fifty-two years of age, in the course of his employment at about 2 o'clock on the day of the accident passed in a northerly direction through the engine room, where construction work was being carried on. The path along which he walked was one that had been commonly used by the employees for some time past. It was two feet wide and was constructed of a thin coating of concrete laid on ashes. It passed between a pump on one side and an excavation on the other. The side of the path next to the excavation was about five inches lower than the other side. The excavation was dug some three weeks or more before the accident and plaintiff knew it was there, and since it was made had walked along the path eight or ten times before he was hurt. Plaintiff's evidence shows that the excavation was about nine or ten feet long, five or five and one-half feet wide, and three feet deep. Defendant says it was seven feet long, three feet wide, and eighteen inches deep. Both agree that it came close to the edge of the path. On the day of the accident loose boards from a concrete form that had been taken down lay scattered along the path, and plaintiff testified that as he came along the path opposite the

excavation he stepped on a piece of board that was lying there and the bank and dirt caved away and he slipped off the board backward into the hole, and sustained the injuries complained of. There is no evidence contradicting his statement as to how he fell into the excavation.

The gist of defendant's argument is that since plaintiff knew of the existence of the excavation and its location with reference to the path; knew that the latter was covered with only a thin coating of concrete and saw the boards scattered about, he was aware of the defect that caused his fall, and having failed to show that his attention was in any way excusably diverted he must be presumed to have remembered the defect and to have been negligent in being injured by it. Numerous Wisconsin cases beginning with *Devine v. Fond du Lac,* 113 Wis. 61, 88 N. W. 913, and ending with *Robinson v. Oconto,* 154 Wis. 64, 142 N. W. 125, are cited to sustain the proposition stated. If the case came squarely within the principle announced the granting of a new trial could perhaps be sustained, if at all, only upon the ground that we could not say there was a clear abuse of discretion under all the circumstances disclosed by the record, including the refusal of the request to reopen the case for further testimony. But we think the case is one that does not fall under the principle applicable to a known defect. It is true plaintiff knew of the excavation, of the thinness of the concrete, and of the loose boards scattered about. But it does not appear that he knew of or even suspected the insecure condition of the bank under the concrete. That is what caused him to fall. He says "the bank caved away and the dirt" and he fell. There is nothing in the evidence to charge him with knowledge of the condition of the bank at the place it caved in. In walking along the path he could not very well see the face of the bank that caved in, as it was almost directly underneath him. For weeks previously he had walked over the same path safely and had seen others do so. The con-

crete with the earth firm underneath, though thin, had sustained their weight. From anything that appears in the evidence he had no reason to believe that it would not do so at the time of his injury. His stepping upon a board could not be said to contribute to the result, for that served to distribute his weight over a greater area and hence lessen the pressure directly under his foot. Since the path was only two feet wide it did not permit him to keep any distance away from the excavation. He must come quite close to it or else not use the path at all. Just where on the path he walked does not appear. But with the obstruction of a pump on one side of a two-foot path and an excavation on the other it is clear he had no wide latitude of choice. Hence it is not easy to perceive how a recollection of all the defects existing, even if known to him, would have enabled him with the greatest amount of care to proceed more safely than he did. *Zoellner v. Fond du Lac,* 147 Wis. 300, 306, 133 N. W. 35. Whether he was negligent in using the path at all is a jury question. *Fuhrmann v. Coddington E. Co.* 156 Wis. 650, 146 N. W. 796. Under these circumstances it cannot be held as a matter of law that plaintiff was negligent in walking along the path as he did, and the court properly set aside the verdict and granted a new trial.

By the Court.—Order affirmed.

STATE EX REL. KEMPSMITH, Respondent, vs. WIDULE, Clerk, etc., Appellant.

October 6—October 26, 1915.

Taxation of incomes: Annuity upon which inheritance tax was paid.

1. The yearly payments to an annuitant by trustees out of the income of property given to them by will for that purpose are not taxable as income of the annuitant, where the inheritance tax

was duly paid upon the interest of the annuitant in the estate of the testator.

2. Such an annuity is subject to the Inheritance Tax Law, and the value *in præsenti* of the right to receive it may properly be appraised under sub. 4, 5, sec. 1087—15, Stats.

Appeal from a judgment of the circuit court for Milwaukee county: Orren T. Williams, Circuit Judge. *Affirmed.*

Certiorari action to test the validity of the assessment of an income tax, under the laws of this state, on an annuity bequeathed to *Abbie W. Kempsmith* by her husband, Frank Kempsmith.

Mr. Kempsmith, by will, left a considerable estate in trust, in part, to pay out of the net income thereof $3,600 per year to his wife, *Abbie,* so long as she should live. In due course, the bequest was valued under the inheritance tax law of the state, the prescribed inheritance tax was assessed thereon, and was paid by or on account of the beneficiary. When she made her income tax statement for the year she received the first annuity payment of $3,600, she claimed that such sum was not assessable. Such claim was overruled by the taxing officers and she carried the matter, by *certiorari,* to the circuit court for Milwaukee county, where, in due course, it was heard, resulting in a decision that the value, *in præsenti,* of the probable future payments having been determined and the statutory inheritance tax paid thereon, the yearly payments were not taxable under the Income Tax Law. Judgment was accordingly rendered reversing the determination to the contrary.

For the appellant there was a brief signed by the *Attorney General, E. E. Brossard,* assistant attorney general, *Winfred C. Zabel,* district attorney of Milwaukee county, *W. L. Tibbs* and *Daniel W. Sullivan,* assistant district attorneys, *Daniel W. Hoan,* city attorney of Milwaukee, and *Max Schoetz, Jr.,* assistant city attorney; and the cause was argued orally by *Mr. Brossard, Mr. Sullivan,* and *Mr. Schoetz.*

For the respondent there was a brief by *Aarons & Niven,* and oral argument by *C. L. Aarons.*

MARSHALL, J. As above indicated, this appeal involves only this question: If a testator wills property in trust to be invested and a specified sum per year paid out of the net income to a designated beneficiary for life, and such beneficiary's interest in the estate is appraised and the statutory inheritance tax is paid thereon, do the yearly payments made thereafter to the annuitant, constitute income under the income tax laws of this state? We must look to the written law for the answer.

We will rest the case on the letter of the statute, and the logic thereof as heretofore declared by this court that the inheritance tax is a burden placed upon the right to receive by will or inheritance. *Nunnemacher v. State,* 129 Wis. 190, 108 N. W. 627; *Estate of Bullen,* 143 Wis. 512, 128 N. W. 109. Keeping that in mind and avoiding confusion which might be created by indulging in technical distinctions between names of beneficiary interests, the purpose of our legislature is plain. The right to receive being the subject of inheritance taxation, the amount is regulated, primarily, by the value of the right. The right in the particular case has reference to the privilege to receive, for life, the yearly payments. There may be many payments but the right is an entirety. That vested, subject to the burden on the transfer, as soon as the will was allowed. Clearly it could be valued, the transfer tax be assessed thereon, and be wholly liquidated, if such be the legislative plan.

Sec. 1087—1 of the Inheritance Tax Law provides that: "A tax shall be and is hereby imposed upon any transfer of property, . . . or income therefrom in trust or otherwise, to any person," etc. That seems plain and to cover the bequest here since it was income from property held in trust.

Sec. 1087—1, sub. (4), provides that the inheritance tax

shall be imposed when the beneficiary becomes "entitled, in possession or expectancy, to any property or the income thereof," by transfer, by will, or the intestate laws of the state.

Sec. 1087—5, sub. 1 of the original act provided, as does the law now, that the inheritance tax, subject to some exceptions not material to this case, "shall be due and payable at the time of the transfer."

Sec. 1087—15, sub. 4, 5, provides for the appraisal of the value *in præsenti* of the right to receive, as was done in this case; and sec. 1087—9 affords the beneficiary an option to postpone payment of the transfer tax until acquirement of possession, which option, as indicated in the statement, was not taken in this case.

In harmony with the foregoing and, evidently, to render clear the legislative purpose not to place an inheritance tax on the transfer of the right to the entirety, and subsequently such a tax on the elements thereof, it expressly exempted: "All inheritances, devises and bequests received during the year which are subject to and have complied with the inheritance tax laws of this state." Sub. (i), sec. 1087*m*—4.

That language seems about as unambiguous as English words could be. Applied to the situation in hand, the annuity payment bequeathed to *Mrs. Kempsmith,* which was attempt to be taxed under the Income Tax Law, was a part of the entire right to $3,600 per year for her life, was subject to the Inheritance Tax Law, and she complied therewith in all respects. Therefore it must follow that such payment was exempt as the circuit judge decided. Whether the income of the estate paid by the trustees to the annuitant should form part of their taxable income, is not affected by what is here decided.

By the Court.—Judgment affirmed.

STATE EX REL. FIELD, Respondent, vs. WIDULE, Clerk, etc., Appellant.

October 6—October 26, 1915.

State ex rel. Kempsmith v. Widule, ante, p. 389, followed.

APPEAL from a judgment of the circuit court for Milwaukee county: OREN T. WILLIAMS, Circuit Judge. *Affirmed.*

For the appellant there was a brief signed by the *Attorney General, E. E. Brossard,* assistant attorney general, *Winfred C. Zabel,* district attorney of Milwaukee county, *W. L. Tibbs* and *Daniel W. Sullivan,* assistant district attorneys, *Daniel W. Hoan,* city attorney of Milwaukee, and *Max Schoetz, Jr.,* assistant city attorney; and the cause was argued orally by *Mr. Brossard, Mr. Sullivan,* and *Mr. Schoetz.*

Chas. T. Hickox, for the respondent.

MARSHALL, J. This action involves the question in respect to a life annuity of $5,000 per year, decided herewith in *State ex rel. Kempsmith v. Widule, ante,* p. 389, 154 N. W. 695, and is ruled thereby.

By the Court.—Judgment affirmed.

FIELD, Respondent, vs. CITY OF MILWAUKEE, Appellant.

October 6—October 26, 1915.

Statutory remedy, when exclusive: Income taxes paid under protest: Recovery by action: Conditions precedent.

1. Where a statutory remedy is provided for the enforcement of a common-law right without expressly or by necessary inference interfering with freedom to resort to the old remedy, the new one is cumulative unless the court on grounds of public policy sees fit to make its activity in that field more or less contingent upon the new remedy being exhausted.
2. The statutory remedy by appeal from the disallowance by a common council of a claim for repayment of income taxes paid under protest is not exclusive of the right to bring an action to recover such taxes; nor is approval of the assessor of incomes or of the tax commission as provided in sub. (4), sec. 1087*m*—22, Stats., a condition precedent to the maintenance of such action.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

Action to recover taxes paid under protest. There was an income tax assessed on a year's payment of a $5,000 life annuity left to plaintiff by will, payable out of the net income of the testator's estate. The beneficiary's interest in the estate was valued, an inheritance tax assessed thereon, and paid, and subsequently an income tax assessed on a yearly payment made in 1912 and $250 paid for the previous year. Plaintiff claimed a deduction of the annuity payments in arriving at her net income for taxation under the laws of this state. The proper taxing officer, the Milwaukee county board of review and the state tax commission, refused to allow such claim and, in due course, plaintiff paid the tax under protest and, subsequently, duly filed her claim against the city of *Milwaukee* for repayment of the money, which was disallowed. She then commenced this action upon the ground which ruled in *State ex rel. Kempsmith v. Widule, ante,* p. 389, 154 N. W. 695.

For the appellant there was a brief signed by the *Attorney General, E. E. Brossard,* assistant attorney general, *Winfred C. Zabel,* district attorney of Milwaukee county, *W. L. Tibbs* and *Daniel W. Sullivan,* assistant district attorneys, *Daniel W. Hoan,* city attorney of Milwaukee, and *Max Schoetz, Jr.,* assistant city attorney, and a separate brief by *Daniel W. Hoan,* city attorney, and *Max Schoetz, Jr.,* assistant city attorney; and the cause was argued orally by *Mr. Brossard, Mr. Sullivan,* and *Mr. Schoetz.*

Chas. T. Hickox, for the respondent.

Marshall, J. Unless a question of practice presently to be mentioned requires a different result, this cause is ruled in respondent's favor by the decision in the case mentioned in the statement.

Sec. 1164, Stats., empowers common councils to refund taxes illegally assessed and paid, contingent upon "all conditions prescribed by law for the recovery of illegal taxes"

having "been complied with." Sub. (4), sec. 1087*m*—22, makes the section aforesaid applicable to income taxes conditioned upon the written approval "of the assessor of incomes who made the assessment or of the tax commission in the case of assessments made by it, specifying the defect in the assessment or tax proceeding and the amount of taxable income which should have been assessed and the amount of the taxes justly chargeable thereto."

It seems plain from the foregoing that the common council of the city of *Milwaukee* could not, properly, have refunded the taxes for want of the approval mentioned. It is insisted on behalf of appellant that the statutory remedy by appeal is exclusive and that the court should have dismissed the action under the rule in *State ex rel. Superior v. Duluth St. R. Co.* 153 Wis. 650, 142 N. W. 184, and similar cases.

Where a statutory remedy is provided for the enforcemen of a common-law right without expressly, or by necessary inference, interfering with freedom to resort to the old remedy, the new one is cumulative unless the court, on grounds of public policy, sees fit to make its activity in that field more or less contingent upon the new remedy being exhausted. That is the logic of *State ex rel. Superior v. Duluth St. R. Co., supra.* We are unable to discover any clear legislative attempt to make the statutory remedy in question exclusive. Moreover the point is expressly ruled in respondent's favor by *Horlick v. Mount Pleasant, ante,* p. 366, 154 N. W. 375. It was there held that sec. 1087*m*—18 prescribes the condition precedent to the right to bring such an action as this, and that the specification thereof, by a familiar rule of construction, indicates that the legislative purpose was to make that the sole condition. Such condition was satisfied in this case.

By the Court.—The judgment is affirmed.

STATE EX REL. BRENK, Respondent, vs. WIDULE, Clerk, etc., Appellant.

October 6—October 26, 1915.

Taxation of incomes: Inheritance of real estate: Income from without the state.

Assuming, but not deciding, that an inheritance, received by a resident of this state, of real estate located in another state is income within the meaning of the state Income Tax Law, it is within the class of incomes derived from sources wholly without the state and therefore not taxable under that law.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

Certiorari to reverse the action of the income tax board of review of the county of Milwaukee in assessing an inheritance of real estate located in the state of Michigan as a part of the taxable income of the relator.

The relator is a resident of the state of Wisconsin and engaged in business in the city of Milwaukee. Mary Brenk, mother of the relator, died on the 14th day of April, 1913, in the city of Jackson, Michigan, and left an estate consisting entirely of real estate, all of which is located in the state of Michigan. The relator's share of the estate amounted to $7,316.80. On the 24th day of February, 1914, the relator made a report of his income for the year 1913 and filed the report with the county assessor of incomes for the county of Milwaukee. In this report he listed the inheritance here in question under the head of "Gross income," but claimed the right to deduct the inheritance from the amount shown on his report under the head of "Deductions and exemptions."

The county assessor refused to allow the deduction and the county board of review sustained the holding of the assessor. The relator then appealed to the Wisconsin tax commission

and the commission entered an order confirming the action of the county assessor and the board of review.

The relator petitioned for and the circuit court for Milwaukee county allowed a writ of *certiorari* to review the action of the assessing officers. The circuit court entered judgment annulling the acts of the county assessor of incomes and the income tax board of review of Milwaukee county and allowing the inheritance to be deducted from the taxable income of the relator. From such judgment this appeal is taken.

For the appellant there was a brief by the *Attorney General, E. E. Brossard,* assistant attorney general, *Winfred C. Zabel,* district attorney of Milwaukee county, *W. L. Tibbs* and *Daniel W. Sullivan,* assistant district attorneys, *Daniel W. Hoan,* city attorney of Milwaukee, and *Max Schoetz, Jr.,* assistant city attorney; and the cause was argued orally by *Mr. Brossard, Mr. Sullivan,* and *Mr. Schoetz.*

For the respondent there was a brief by *Alexander & Burke,* and oral argument by *F. P. Burke.*

SIEBECKER, J. The inquiry is, Did the court err in holding that the real estate the relator inherited from his mother is not taxable as income under the provisions of the state Income Tax Act? The inheritance, consisting of real estate, is located in the state of Michigan, and was received by the relator from his mother, who at the time of her death in April, 1913, was a resident of the state of Michigan. Relator was then a resident of the city of Milwaukee, and in the month of February, 1914, made return of his income for the year of 1913 to the assessor of incomes for the county of Milwaukee for purposes of taxation.

Sec. 1087*m*—10, Stats. 1913, provides that the state tax commission and assessors of income shall annually on January first, or as soon as practicable thereafter, assess every income received during the preceding calendar year liable to

taxation under the law. The law in force January 1, 1914, must control in the instant case. Sub. 2, sec. 1087*m*—2, declares that the term "income," as used in the act, shall include: (a) All rent of real estate; (b) all dividends from stock and interest from money loaned or invested; (c) all wages, salaries, or fees; (d) all business profits; (e) all royalties from mines, franchises, and legalized privileges; (f) "and all other gains, profits or income of any kind derived from any source whatever except such as hereinafter exempted." Sec. 1087*m*—4 provides for various deductions, and among others specifies the following in sub. (i): "All inheritances, devises and bequests received during the year which are subject to and have complied with the inheritance tax laws of this state." The taxing authorities of Milwaukee county and the state tax commission, it is stated, have included inheritances as being "income" within the provisions of the Income Tax Act and determined that relator's inheritance of real estate located in the state of Michigan was assessable income. The provisions of the act do not clearly express the legislative intent on this subject. The correctness of the interpretation the taxing authorities have given this part of the statute is important, and in the light that the issues of the case now before us will be finally determined under another phase of the statute, we deem it advisable not to determine whether or not an inheritance is income within the meaning of the Income Tax Act. Assuming, without deciding, that relator's inheritance of real estate located in the state of Michigan is income within the meaning of this statute, is it assessable under the provisions of this act? The provisions of sub. 3 of sec. 1087*m*—2, Stats. 1911, were fully considered and construed in the case of *State ex rel. Arpin v. Eberhardt,* 158 Wis. 20, 147 N. W. 1016. Upon full discussion and consideration of the different parts of this statute it was determined that:

"All income received by residents of the state from sources

within it is taxable, and all income of such residents from sources without the state on account of rentals, stocks, bonds, securities, or evidences of indebtedness is taxable. No other income is made taxable by the law and therefore cannot be taxed."

Nothing is suggested nor do we perceive any reasons why this was not the correct interpretation of the statute. The provisions of this section as amended in 1913 do not change the law in this respect. Assuming for the purposes of this case that this inheritance is "income" within the meaning of the Income Tax Law, it is within the class of incomes derived from sources wholly without the state, and therefore is not taxable under the law. The trial court properly set aside the action of the Milwaukee county income tax board of review by which relator was refused a deduction of the amount of $7,316.80, the sum he specified in his income tax return as an inheritance of real estate located in the state of Michigan.

By the Court.—The judgment appealed from is affirmed.

SOUTH SIDE LUMBER COMPANY, Respondent, vs. JOHN ELLER LUMBER COMPANY and others, Appellants.

October 6—October 26, 1915.

Conspiracy: Collusion: Pleading: Complaint: Joinder of causes of action: Parties.

1. To constitute conspiracy no express agreement is necessary, an understanding or tacit concurrence in mental intent to effect the common purpose being sufficient; and under certain circumstances "collusion" is synonymous with conspiracy.
2. A complaint charging, among other things, collusion between all except one of the defendants to defraud the plaintiff corporation, and that in pursuance of such collusive agreement they fraudulently and corruptly converted goods and money of the plaintiff and used plaintiff's funds in the purchase of real estate, title to

which was taken in the name of certain of the defendants, and praying for an accounting of the property so converted and for general relief, is *held*, on demurrer, to state but one cause of action.

3. The fact that the title to some of the property in question was placed in the defendant who was not a party to the collusive agreement, rendered her a proper party to the action.

Appeals from orders of the circuit court for Milwaukee county: F. C. Eschweiler, Circuit Judge. *Affirmed.*

The appeals are from orders overruling demurrers to plaintiff's complaint. After alleging the corporate existence of plaintiff and defendant *John Eller Lumber Company,* the complaint alleges, among other things:

That the defendant *Stephen H. Eller* as vice-president, treasurer, and sole manager and pretended president of plaintiff, and in collusion with the defendant *John Eller Lumber Company* and defendant *George F. Eller,* fraudulently and unlawfully transferred, converted, and delivered unto the defendant *John Eller Lumber Company,* of which the defendant *Stephen H. Eller* was the president and defendant *George F. Eller* secretary and treasurer, and unto *George F. Eller* large quantities of goods, wares, merchandise, and money from the plaintiff without accounting and paying therefor; that the defendants jointly and severally unlawfully held said goods, merchandise, and money and have converted the same into cash for their own use, to the damage of plaintiff in the sum of $30,000.

That the books and records of the plaintiff showing the transaction were destroyed by the defendant *Stephen H. Eller;* that the defendant *Stephen H. Eller* unlawfully and corruptly converted large amounts of money belonging to the plaintiff while he was acting as vice-president, treasurer, and sole manager of plaintiff's business, and invested the money so unlawfully converted in real estate, taking the title thereto in his own name, and has taken and converted from plaintiff

large sums of money, and said *Stephen H. Eller* with the funds of plaintiff purchased real estate, causing the record title to appear in defendant *George F. Eller;* and also used the funds of the plaintiff in the purchase of real estate and caused the title to the same to appear in the name of defendant *Emily Knauer.*

That the defendant *Stephen H. Eller* is lessee of a safe-deposit box in the First Trust Company in Milwaukee, in which he has concealed records, books, moneys, and securities belonging to plaintiff, and plaintiff fears that said *Stephen H. Eller* will dispose of the contents of said box.

That defendant *John Eller Lumber Company* claims to be the owner of real estate, the title to which is in the name of *George F. Eller,* and that plaintiff believes said real estate was purchased with the funds of this plaintiff.

That plaintiff is informed and believes that the defendants, unless restrained, will dispose of their property to innocent purchasers for value and leave no property available from which plaintiff may be reimbursed for the unlawful and corrupt conversion set out in the complaint; that the defendant *Stephen H. Eller* pretends to be the owner of some shares of capital stock of plaintiff which are now held by pledgees for moneys advanced to defendant *Stephen H. Eller,* and that said *Stephen H. Eller* and *George F. Eller* are the owners of other stocks which are partially incumbered and held by pledgees; that plaintiff is informed and believes that the defendants *Stephen H. Eller* and *George F. Eller* and *John Eller Lumber Company* will dispose of their property to innocent purchasers for value, leaving no funds from which this plaintiff may be reimbursed, unless restrained, all to the irreparable injury of plaintiff; that defendants are financially irresponsible and plaintiff is without adequate and complete remedy at law.

The prayer demands accounting of the goods, wares, mer-

chandise, and moneys so conveyed, transferred, and converted by defendants belonging to plaintiff, and general equitable relief.

The defendants demurred separately, setting up as grounds of demurrer (1) that several causes of action have been improperly united; (2) that the complaint does not state facts sufficient to constitute a cause of action. The court overruled the demurrers, from which orders these appeals were taken.

The cause was submitted for the appellants on the brief of *J. W. Flynn* and *Henry V. Kane,* and for the respondent on that of *Bohmrich & Gabel.*

Kerwin, J. That the complaint states a cause of action is clear and is not seriously denied by the appellants, therefore no time need be spent in discussing the demurrer on that ground. It is insisted by counsel for appellants that several causes of action are improperly united in the complaint. It is argued that there is a separate cause of action stated against the defendant *Stephen H. Eller* united with a cause of action against the other defendants except the defendant *Knauer,* which two causes of action are united with a third against the defendants except the defendant *Eller Lumber Company.* It is contended that the issues in these alleged separate causes of action are in no way related to each other and do not affect all the parties to the action, therefore cannot be joined.

We think the intention of the plaintiff in drafting the complaint was to state but one cause of action and that the complaint is capable of that construction. There are specific allegations that all of the defendants except the defendant *Knauer* fraudulently colluded together to defraud the plaintiff out of its property; that *Stephen H. Eller* as vice-president, treasurer, sole manager, and pretended president of plaintiff

fraudulently and unlawfully transferred, converted, and delivered unto the defendant *John Eller Lumber Company* and the defendant *George F. Eller* large quantities of goods, wares, merchandise, and money of the plaintiff without accounting and paying therefor. It is further alleged "that the defendants jointly and severally unlawfully held said goods, merchandise, and money and have converted the same into cash for their own use, to the damage of the plaintiff in the sum of $30,000." The other allegations of the complaint respecting the unlawful and corrupt conversions by the defendant *John Eller Lumber Company, Stephen H. Eller,* and *George F. Eller* and the taking of title to real estate purchased with the money of plaintiff manifestly relate to the collusive agreement made and entered into by the defendants. At least such construction may fairly be inferred from the whole complaint. *Laun v. Kipp,* 155 Wis. 347, 145 N. W. 183, and cases there cited; *Sullivan v. Ashland L., P. & St. R. Co.* 156 Wis. 445, 146 N. W. 506. Looking at the whole complaint, it may fairly be inferred that the intention of the pleader was to charge collusion or conspiracy between all of the defendants except *Knauer* to defraud the plaintiff, and that they carried out such collusive agreement by the conversions set up in the complaint.

The complaint charges "collusion" between the defendants, and this court has held that under certain circumstances collusion is synonymous with conspiracy. *Miller v. Bayer,* 94 Wis. 123, 68 N. W. 869. To constitute conspiracy no express agreement is necessary. An understanding or tacit concurrence in mental intent to effect the common purpose is sufficient. *Patnode v. Westenhaver,* 114 Wis. 460, 90 N. W. 467.

The fact that the title to some of the property alleged to have been unlawfully converted was placed in defendant *Knauer* made her a proper party defendant. Sec. 2603,

Stats.; *Draper v. Brown,* 115 Wis. 361, 91 N. W. 1001; *Grady v. Maloso,* 92 Wis. 666, 66 N. W. 808; *Sullivan v. Ashland L., P. & St. R. Co.* 156 Wis. 445, 146 N. W. 506.

The complaint is based upon one primary right—accounting and recovery of property fraudulently converted under a collusive agreement between all of the defendants except the defendant *Knauer,* and she is a proper party under the statute and repeated decisions of this court.

By the Court.—The orders appealed from are affirmed.

BANASZEK, by guardian *ad litem,* Appellant, vs. F. MAYER BOOT & SHOE COMPANY, Respondent.
SAME, Respondent, vs. SAME, Appellant.

October 6—October 26, 1915.

Master and servant: Injury: Insecurely guarded rollers: Evidence: Sufficiency: Opinion: Special verdict: Order for judgment: Taxation of costs: Time limited: New trial as to damages only.

1. Under secs. 1636*j* and 1636*jj*, Stats. 1911, which made the duty to securely guard dangerous machinery an absolute one, testimony of an employee that when, as the result of a sudden jerk, his fingers went through a slot in the guard and came in contact with the rollers of a machine for pressing shoe soles they were caught and drawn further in, and that a thin cast-iron strip forming the base of the guard broke and gave way, allowing his hand to be severely hurt, was sufficient to justify the jury in finding that the rollers were not securely guarded, although there was expert testimony to the effect that the guard could not be broken in the manner described.
2. A verdict, if supported by evidence, is not impeached by producing evidence which, if believed by the jury, would have supported a contrary finding.
3. Where the trial court in effect decided that its clerk had no authority to enter an order for judgment on a special verdict, and itself signed and filed a written order for judgment thereon, the date of such written order, not that of said entry by the clerk, fixed

the beginning of the sixty days within which, under sec. 2894*a*, Stats., the prevailing party might tax his costs.

4. The plaintiff in an action for unliquidated damages cannot retain the advantage gained by a verdict in his favor and at the same time have a new trial for the purpose of increasing or adding to the damages assessed in such verdict. [Whether such a practice, even if authorized by statute, would be due process of law, is doubted.]

APPEALS from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

For the plaintiff there were briefs by *Rubin, Fawcett & Dutcher,* attorneys, and *W. B. Rubin* and *Paul R. Newcomb,* of counsel, and oral argument by *W. B. Rubin.*

For the defendant there was a brief by *Doe, Ballhorn & Wilkie,* and oral argument by *Harold M. Wilkie* and *J. B. Doe.*

TIMLIN, J. In this action by an employee against his employer grounded upon negligent injury, the plaintiff recovered judgment for $2,000 and costs for a serious injury to his left hand, not, however, amounting to total loss or disability of the hand. From this judgment the defendant appeals, contending chiefly that the evidence is insufficient to support the verdict, and that in any event costs should not have been taxed in plaintiff's favor because more than sixty days from the rendition of the verdict had expired when the costs were taxed. The plaintiff appeals because he considers the damages inadequate, and attempts to raise this question by exception to the denial of his motion made below to let the verdict stand for $2,000 and grant a partial new trial for an assessment of additional damages, or in the alternative to let the verdict stand as fixing the liability of the defendant and award a new trial for the purpose of assessing damages only.

Considering first the defendant's appeal: The plaintiff was working at a machine pressing shoe soles between rollers. Between him and these rollers was a cast-iron guard, and

through a slot or opening in this, parallel with the rollers, the soles were fed into the rollers. Below this slot and part of the guard was a thin cast-iron strip forming the base of the guard and fastened to the table in front of the rollers by a screw in the middle and tied at each end with wire passing under the table. This guard had previously been broken and was repaired by an iron lug bolted and riveted to the upright and to the flat strip mentioned, but it appeared to have some looseness or play. The plaintiff's account of the injury is that, standing with both feet on the treadle in order to increase the pressure of the rollers, he was by a sudden jerk, caused probably by the rollers coming together after a piece of sole leather had passed through, thrown forward, and, extending his hands, he thrust one of them through the slot to contact with the rollers, which, seizing his fingers, drew them further in, when the guard gave way by the breaking of the cast-iron strip mentioned and allowed his hand to be severely hurt. Defendant's counsel and his expert witness do not believe that it could be possible to break the cast-iron guard in this way and present an explanation which is quite plausible and supported by evidence, although defendant's witness Herman Mueller on cross-examination shows that the break could happen in that way without the fault of the operator. But a verdict, if supported by evidence, is not impeached by producing evidence which, if believed by the jury, would have supported a contrary finding.

The question remains whether the employer furnished a secure guard. On September 1, 1911, when this injury took place, secs. 1636*j* and 1636*jj*, Stats. 1911, which made the duty to furnish such a guard absolute, were in force. *Hilsenhoff v. Fass,* 155 Wis. 628, 145 N. W. 198.

In the continual flux and change now characteristic of the statute law, this statute appears in the Statutes of 1913, with its head cut off, as sec. 1636*jj*, which refers to guarding or protecting machinery or appliances, etc., "in the manner re-

quired in the foregoing section." The foregoing section relates to the number of matches to be packed in a box. Ch. 223, Laws of 1913, appears to repeal sec. 1636*j*, which imposed the absolute duty to guard machinery, but whether any other provision of statute takes its place, or whether with the "foregoing section" repealed the duty still persists as an absolute duty, are questions not in this case and therefore not decided. But under the statute governing this case a guard which was so insecure as to fail of its purpose in the very exigency in which a guard is required might authorize the jury to find that the machinery was not securely guarded. There is evidence from an inspection of the guard itself that it is very thin, brittle, and consequently weak. We cannot accept as conclusive upon the court below or the jury or this court, opinion testimony to the effect that this guard could not be broken in the manner described by the plaintiff, viz. by having his hand drawn by the rollers behind the guard further into the feed slot or opening in the guard. For, although somewhat disguised, such conclusion is really an opinion. So we conclude that there was evidence from which the jury might find as they did, "the revolving rollers at which the plaintiff worked when he was injured were not securely guarded." There was also evidence from which the jury were authorized to find that the plaintiff at the time of his injury was performing his work in the usual manner.

On defendant's second point it appears that after the special verdict there were motions in writing on the part of the plaintiff and on the part of the defendant and that the court heard and denied these several motions on July 30, 1914. He signed no written order on that day, but the clerk entered in the clerk's record book, apparently on his own motion, the following: "July 30, 1914. The court now being fully advised in the premises renders decision in open court, orders: that the motion for a new trial be denied and that the motion for increase of damages be denied. The court further or-

dered that judgment be *ordered* for the plaintiff for $2,000 damages as found by the special verdict." On October 14, 1914, the circuit judge, by an order in writing signed and filed on that day, ordered that the plaintiff have judgment on said verdict for the sum of $2,000 with interest and costs.

In *Dresser v. Lemma,* 122 Wis. 387, 100 N. W. 844, and cases therein cited, the rule was established that sec. 2894*a* relates only to verdicts upon which the clerk of the court has authority to prepare and enter the proper judgment, hence not to special verdicts, at least until after the court makes an order for judgment thereon. The clerk could not give himself authority, where he otherwise had none, by any entry in his record book not the act of or in pursuance of the order of the circuit judge. The latter having signed the subsequent order in writing on October 14, 1914, and having approved the allowance of costs which were taxed more than sixty days after July 30, 1914, by doing so in legal effect decided that the clerk had no authority to enter judgment on this verdict until on or after October 14, 1914. It is noticeable that the clerk's entry itself by implication anticipates the necessity or the probable making and filing of a written order at some later time, for it says, "ordered that judgment be ordered for the plaintiff."

We believe it is the general practice to have an order in writing signed and filed in case the motion for judgment on a special verdict is either granted or denied. It is only by construction that special verdicts are included at all in sec. 2894*a,* that section being limited, as we have seen, in case of verdicts, to a verdict upon which the clerk is authorized to enter judgment. So where the circuit court by his rulings repudiates the notion that the clerk's entry was his act in ordering judgment and enters instead a written order duly signed and filed, the latter must be taken to set the sixty days running within which the prevailing party must tax his costs.

The plaintiff plants his appeal on very novel grounds.

Notwithstanding its novelty, the plaintiff's counsel appears to be quite serious in his presentation of and insistence upon a right to hold fast to the verdict wherever it favors him and to set it aside and have a new trial of the remaining questions in the action so far as the verdict is adverse to him. But the damages in an action for negligence are entire and indivisible and cannot be split up so as to form a basis for several trials. Indeed the splitting up of entire demands so that a man may institute several actions where one would suffice is forbidden, whether these demands arise on contract or grow out of tort. This is too elementary to require citation of authority to support it. It may well be doubted whether, even if authorized by statute, it would be due process of law to permit the plaintiff, in an action for unliquidated damages, to retain the advantage gained by the verdict and at the same time have one or more new trials for the purpose of increasing or adding to the damages first awarded. This might deprive the defendant in such new trial of the benefit of many items of evidence proper to be considered by the jury in mitigation of unliquidated damages. It would also impair or destroy the finality of verdicts and of judgments founded thereon. Besides, the amount of the verdict here is not so low as to indicate bias, passion, prejudice, or perverseness on the part of the jury. Between this amount awarded and the higher amount expected by plaintiff, honest men might reasonably differ with regard to its adequacy as compensation. The plaintiff's motions were properly denied, and the judgment must be affirmed on both appeals.

By the Court.—It is so ordered, neither party to recover costs, except that the defendant pays the clerk's fees.

MUEHLBAUER, Appellant, vs. KLOKNER, Respondent.

October 6—October 26, 1915.

Highways: Collision between vehicles: Negligence: Questions for jury.

1. **In an action for personal injuries sustained when defendant's wagon collided with plaintiff's buggy which was being driven in the opposite direction on the extreme right of the traveled track, it is *held* on the evidence that plaintiff was not guilty of contributory negligence as a matter of law in failing to have her buggy brought to a standstill before the collision occurred or in failing to shout a warning to defendant's driver. *Lloyd v. Pugh*, 158 Wis. 441, distinguished.**
2. **It is not negligence as a matter of law to permit an eleven-year-old boy, when accompanied by a parent, to drive a horse which is not shown to be difficult to manage.**

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Reversed.*

Max J. Leutermann and *F. P. Hopkins,* for the appellant.

G. J. Davelaar, for the respondent.

BARNES, J. This is an action for damages for personal injury. The jury found the defendant negligent, acquitted the plaintiff of contributory negligence, and awarded $1,350 damages. The trial court changed the answer of the jury on the question of contributory negligence and ordered judgment dismissing the complaint. Plaintiff appeals.

Plaintiff was proceeding easterly on one of the streets of Wauwatosa in a light buggy drawn by one horse which was being driven by her eleven-year-old son. The defendant's servant was driving a heavy horse attached to a heavy wagon in the opposite or westerly direction. Both horses were proceeding slowly. The two vehicles collided, and the plaintiff was thrown from her buggy and injured. Water and sewer pipes were being laid on the north side of the street, which for this reason was closed to travel.

There was evidence from which the jury might have found that the unobstructed portion of the street was forty feet wide in the vicinity of the collision; that there was an embankment on the south edge of the traveled street from one and one-half to two and one-half feet in height; that the vehicle in which plaintiff was riding was being driven as close to this embankment as it could be, and that the defendant had the free use of all of the forty-foot strip except that taken up by the plaintiff's buggy on the extreme south side.

The lower court held plaintiff guilty of contributory negligence because her vehicle was not brought to a standstill before the collision occurred, and perhaps because she did not do anything to warn the defendant's driver that a collision was imminent unless he changed his course. The court seems to have based its decision largely on the case of *Lloyd v. Pugh,* 158 Wis. 441, 149 N. W. 150. In this case the collision occurred at the intersection of two streets. The plaintiff was going east and the defendant's team nearly north. It was the duty of one or the other of them to stop if it was necessary to do so to avoid a collision. Defendant's driver had the right of way and plaintiff was held guilty of contributory negligence because she did not observe the law of the road or else veer to the north to avoid the collision. Here, according to evidence which the jury had a right to believe, the buggy in which the plaintiff was riding was not only on the right side of the traveled track but was to the extreme right of such track when the accident occurred. It is not at all certain that by stopping she would have improved the situation or prevented the collision. She had a right to assume until it was perhaps too late that defendant's driver would not "hog" all of the road, but would turn out in time to prevent what occurred. She also had a right to assume that the teamster was not blind and that he was paying some attention to where he was going, without an alarm being shouted at him. Persons riding in horse-

drawn vehicles are not obliged to carry trumpets with them. Both plaintiff and her boy testified that they were frightened when they became aware of the fact that they were in danger of being run into. This was natural enough, particularly as plaintiff was holding a three-year-old baby in her arms.

This court held at an early day in *Wood v. Luscomb,* 23 Wis. 287, where the facts were more favorable to the defendant than they are here, that it was not contributory negligence as a matter of law for a person driving on the right side of a street to fail to stop before the collision occurred. There may be cases where the contrary should be held, but under the facts in the instant case we are of the opinion that the contributory negligence of the plaintiff was a jury question. It is suggested that it was negligence on plaintiff's part to permit an eleven-year-old boy to drive the horse. We do not think it is negligence as a matter of law to permit a boy of this age when accompanied by a parent to drive a horse that was not shown to be difficult to manage. We do not see how the boy's manner of driving, or his management of the horse, had anything to do with the accident, unless it be said that he was bound to stop before the collision occurred. The defendant's teamster might have had a wholesome fear or respect for one who was more muscular than he, and hesitate to run him down, but others besides pugilists have rights on our public highways.

By the Court.—Judgment reversed, and cause remanded with directions to reinstate the answer of the jury to the fourth question in the special verdict and to enter judgment for the plaintiff on the verdict as corrected.

WEIGELL, Respondent, vs. GREGG and husband, Appellants.

October 7—October 26, 1915.

Appeal: Review: Conclusiveness of findings: Mortgages: Implied agency to receive payments: Possession of securities: Trust companies: Tender: Payment into court: Foreclosure: Solicitor's fee.

1. A finding by the trial court which, though nominally a finding of fact, is in the nature of a legal conclusion from undisputed evidence has not the same conclusiveness on appeal as a finding resting upon probative disputed facts, but may be disregarded almost as readily as a pure error of law.
2. A note and mortgage given by defendant to a trust company, payable to it at its offices, were sold and delivered to plaintiff. Defendant paid the interest to the trust company for five years. Then, by written agreement between defendant and the trust company as agent for the owner (whose identity was not disclosed), the time for payment was extended, defendant agreeing therein to pay the principal and interest to the trust company as agent. Plaintiff consented to this agreement. Afterwards defendant paid interest and also, before it was due, a part of the principal to the trust company. *Held*, that plaintiff had given the trust company apparent authority to receive such payments and was bound thereby.
3. The mere fact that an agent has not possession of notes or securities at the time of payment is not conclusive that he has no authority to receive such payment.
4. In view of the broad statutory powers of trust companies and the universal custom of dealing with them as principals, though known to be agents or trustees, their authority to act need not be established by the same strict rules that obtain in case of individuals.
5. As against persons who in good faith and without negligence have relied upon the authority of a trust company to act in a business matter of which, to the knowledge of its principal, it has assumed full charge, such principal must be held bound by acts of the company which, though in excess of its express authority, are not unusual and are fairly germane to the subject matter intrusted to it.
6. Refusal of the holder to receive the amount due on a note because he claimed a larger sum, did not waive the tender or make it unnecessary to keep the tender good by payment into court as provided in Circuit Court Rule XV.

7. An allowance, without evidence, of $200 as solicitor's fee on foreclosure of a mortgage for $4,500 on which the balance due was about $1,550, is reduced to $50.

Appeal from a judgment of the circuit court for Milwaukee county: Lawrence W. Halsey, Circuit Judge. *Reversed.*

Action to foreclose a mortgage for $4,500. Defense, payment of $3,000 and tender of balance. The circuit court found against the defendants and entered judgment for the face of the mortgage with interest, costs, and $200 solicitor's fee. From such judgment defendants appealed.

Adolph Huebschmann, for the appellants.

Charles E. Wild, for the respondent.

Vinje, J. December 10, 1903, the defendant *Margaret Anna Gregg* executed and delivered to the Citizens Trust Company her note for $4,500 payable in five years and secured by a mortgage on real estate executed by her and her husband, *Walter F. Gregg.* On December 10, 1908, the time of payment of the note was extended five years by an agreement in writing entered into by the Citizens Trust Company as agent for the owner of the note and mortgage as party of the first part and *Margaret Anna Gregg* and *Walter F. Gregg* as parties of the second part. In this extension agreement the defendants agreed to pay the Citizens Trust Company as agent the sum of $4,500 in five years, together with interest at the rate of five per cent. per annum payable semi-annually. This agreement was signed, sealed, witnessed, and acknowledged by the respective parties and was accompanied by eleven semi-annual interest coupons signed by both defendants. The defendants negotiated the loan through one H. J. Mabbett and paid their semi-annual interest to the Citizens Trust Company through him. On August 24, 1909, they paid directly to the Citizens Trust Company $1,000 of principal and it released a portion of

the mortgaged premises. On October 2, 1909, they paid a further sum of $2,000 directly to the Citizens Trust Company and took a receipt for the payment. On January 11, 1904, the plaintiff bought the note and mortgage from the Citizens Trust Company and both were delivered to him and have remained in his possession since. He also bought from time to time a number of other notes and mortgages from it, of which he took and retained possession. The Trust Company collected interest on the notes sold to him and in some cases the principal also, and it would either turn over the cash to him or other securities approved by him in lieu of cash. The Trust Company looked after taxes and the insurance on mortgaged premises and executed releases of mortgages when paid in full. The Trust Company did not notify plaintiff of the payment of the $1,000 and $2,000 principal paid in 1909, and he did not perhaps learn definitely of such payments till September 4, 1913. He then demanded cash or approved securities from it, but received neither. He tried at various times between then and October 2, 1913, when the Trust Company closed its doors and was taken charge of by the commissioner of banking of this state, to get a settlement with it, but without success. On October 7, 1913, he notified the defendants not to make any payments to the Trust Company, and that was the first time the defendants or either of them knew who owned their note and mortgage. The extension agreement was sent to plaintiff and he consented to it, but whether such consent was given before or after its execution does not clearly appear; and he says he is unable to say whether or not he knew by the terms of the agreement that the Trust Company had authority to collect principal and interest. All other notes and mortgages bought by him from the Trust Company as well as the ones in suit were made payable to the Trust Company at its office.

The trial court found that the Citizens Trust Company

had no authority from the plaintiff to receive the partial payments of $1,000 and $2,000, and, since he did not receive the same or any part thereof, defendants are entitled to no credit therefor as against him. This finding rests upon conclusions drawn from the almost undisputed evidence as to the transactions between the several parties rather than upon any conflict in the testimony. It therefore does not carry with it the same conclusiveness as a finding resting only upon probative disputed facts. It is rather in the nature of a legal conclusion drawn from undisputed evidence, which, if not in accordance with the view of this court, can be disregarded almost as readily as a pure error of law on the part of the trial court. This is said not by the way of criticism of the finding made or of its form, but as a reason why this court feels free to disregard it though nominally a finding of fact.

Treating the Trust Company as having no greater general powers than an individual agent, as the trial court evidently did, he came to the conclusion that it had neither express nor implied authority to receive a part of the principal before due. The cases of *Bartel v. Brown,* 104 Wis. 493, 80 N. W. 801; *Kohl v. Beach,* 107 Wis. 409, 83 N. W. 657; *Loizeaux v. Fremder,* 123 Wis. 193, 101 N. W. 423; and *Bautz v. Adams,* 131 Wis. 152, 111 N. W. 69, tend to support such conclusion, though it is deemed that the undisputed facts bring the case within the doctrine of implied authority even if the agent were an individual instead of a trust company. *McDermott v. Jackson,* 97 Wis. 64, 72 N. W. 375; *Freeman v. Dells P. & P. Co.* 150 Wis. 93, 135 N. W. 540. In *McDermott v. Jackson* the rule is thus stated:

"If a principal so conducts his business, either through negligence or otherwise, as to lead the public to believe that his agent possesses authority to contract in the name of the principal, such principal is bound by the acts of such agent, within the scope of his apparent authority, in so contracting with any person who, upon the faith of such holding out, be-

lieves, and has reasonable ground to believe, that the agent has such authority, and in good faith deals with him, even though such agent have express secret instructions to the contrary. If the principal, by his conduct, imparts to his agent a particular character, he is legally responsible to innocent third persons for all responsibilities which would be incident to such character if it existed by express authority, and without regard to any secret instructions." Pages 72, 73.

In the present case the principal, through the extension agreement, imparted to the Trust Company the apparent power to deal with the whole subject matter of the loan by making it payable to the Trust Company at its office and by failing to disclose his identity, thus making it impossible for the defendants to know who was the owner of the securities. Only a partial payment of principal was made, and there was no special occasion for the production of the note and mortgage, or a demand for them, as in case of a payment in full. There is nothing in the evidence to show that the defendants did not have a right to assume that the Trust Company at all times held possession of the note and mortgage. When paid in full, a failure to demand and receive them is deemed in law negligence on the part of the payor unless excused by special circumstances. *Spence v. Pieper*, 107 Wis. 453, 83 N. W. 660. But a want of possession of securities does not determine the question of authority. In 2 Corp. Jur. 625, the rule is thus stated:

"The mere fact that the agent has not possession of the notes or securities at the time of payment is not conclusive that he has no authority to collect the same, but is only a circumstance to be considered in determining the question; and the facts and circumstances may be such that, notwithstanding the agent has not such possession, he has actual authority, expressed or implied, to make the collection."

A large number of authorities are cited to sustain the rule stated.

In *Central T. Co. v. Folsom*, 167 N. Y. 285, 60 N. E.

599, it is said, quoting from *Doubleday v. Kress,* 50 N. Y. 410:

"The reason of the rule that one who has made the loan as agent and taken the security is authorized to receive payment when he retains possession of the security is founded upon human experience that the payor knows that the agent has been trusted by the payee about the same business, and he is thus given a credit with the payor."

In *Cheshire Prov. Inst. v. Vandergrift* (Neb.) 95 N. W. 615, it appeared that an undisclosed principal directed his agent to make a loan and to take a note and coupons evidencing the loan and the mortgage securing the same in the name of the agent and that he permitted the agent to collect the interest. It was held that such facts tended strongly to show authority on the part of the agent to receive and receipt for the payment of the note and to enter a satisfaction of the mortgage.

But in determining the question of the powers of an agent trust companies do not stand on a parity with individuals. They are by law (secs. 2024—77*i et seq.* Stats. 1913) authorized to act "as agent or attorney for the transaction of business, the management of estates, the collection of rents, interests, dividends, mortgages, bonds, bills, notes, and other securities or moneys" (sub. (7), sec. 2024—77*k*), and under such authority it has become customary in the business world to do just what the plaintiff did in this case—leave it to the Trust Company to collect principal and interest on loans purchased from it, reinvest the moneys collected subject to his right to approve the security, look after the payment of taxes and insurance on mortgaged premises, and execute releases of mortgages when paid.

In the instant case the loan was negotiated by the Trust Company and made payable to it and at its office; interest was paid to it semi-annually for five years, and then it made an extension agreement with the defendants, signed and ac-

knowledged by it. The principal and interest were made payable to it and at its place of business. True, the extension agreement informed the defendants that the Trust Company was acting for an undisclosed principal. But such principal, they knew, directed them to deal with the Trust Company by keeping himself undisclosed. They were compelled to deal with the Trust Company as long as neither the principal nor it saw fit to inform them who in fact was the owner of the note and mortgage. The custom of dealing with trust companies on the assumption that they possess plenary authority to do the things they hold themselves out as having authority to do, is so general that incalculable hardships would ensue if their authority to act had to be established by the same strict rules that obtain in the case of an individual acting as an agent. Where to the knowledge of a principal they assume full charge of a business matter he must be held to have constituted them his agent for that purpose, even though they may exceed express authority, so long as their action is fairly germane to the subject matter intrusted to their hands. The principal cannot be heard to say, as against those who have in good faith and without negligence relied upon their authority to act, that he did not expressly empower them to do an act which relates to and is a customary transaction in the matter intrusted to them. Owing to the broad statutory authority given them to act as agents for others, and the universal custom of the public of dealing with them as with a principal, though known to be agents or trustees, they must be held to have authority to act where they assume to do so, and where their action is not an unusual one and is germane to the subject matter intrusted to them, and parties in good faith, and without negligence, believe that they possess the authority necessary to bind their principal.

Tested by these principles the case at bar is one where the plaintiff is bound by the acts of its agent, the Trust Com-

pany, in receiving part of the principal before it became due and in releasing a portion of the mortgaged premises. Payment to it was payment to plaintiff. The trial court, therefore, erred in refusing a credit to the defendants of $3,000 on the note.

On December 10, 1913, the defendants tendered plaintiff the sum of $1,546.16, the amount then due on the note. He refused to receive it, claiming $3,000 more with interest was due. The defendants failed to pay the amount into court as required by Circuit Court Rule XV, and the court properly found that their tender was not kept good. The cases of *Kreutzer v. Lynch,* 122 Wis. 474, 100 N. W. 887, and *Inglis v. Fohey,* 136 Wis. 28, 116 N. W. 857, relied upon by defendants to the effect that plaintiff waived the tender by refusing to accept the money, do not apply to a case like the one at bar where the dispute is as to the amount due. The cases mentioned are where the party to whom the tender was made repudiated *in toto* the contract relied upon by the party making the tender. The mortgage provides for a customary and reasonable sum of money as solicitor's fee. The court found, without any evidence so far as we can discover from the record, that $200 was a reasonable and customary fee. This amount should be reduced to $50.

By the Court.—Judgment reversed. The trial court is directed to enter judgment of foreclosure against the premises not released from the lien of the mortgage in favor of plaintiff for the sum of $1,546.16, with interest thereon from December 10, 1913, at six per cent., $50 solicitor's fee, and the costs of the action. Judgment for a deficiency, if any, to be entered against both defendants. The defendants are entitled to their costs upon this appeal.

WINTERNITZ, Appellant, vs. SCHMIDT, Respondent.

October 7—October 26, 1915.

Judgment on cognovit: Reopening case: Discretion: Appeal from civil court: Costs.

1. It was an abuse of discretion to refuse to reopen a case in which judgment had been entered on cognovit and permit defense to be made, where the moving papers included an answer setting forth a complete defense and showed that the judgment was suffered through "mistake, inadvertence, surprise, or excusable neglect."
2. The hearing of an appeal to the circuit court from the civil court of Milwaukee county is brought on by motion, and motion costs not exceeding $10 may be allowed thereon.
3. Under sec. 3069, Stats. 1913, as amended by sec. 9, ch. 219, Laws 1915, an order of the circuit court simply reversing an order of the civil court is not appealable.

APPEAL from an order of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

Judgment on cognovit having been entered in the civil court of Milwaukee county in this action, that court denied defendant's motion to vacate the judgment and allow a defense to be interposed. On appeal to the circuit court this order was reversed with $10 costs, and the civil court was ordered to allow the proposed defense to be made on certain terms. From this latter order the plaintiff appeals.

For the appellant the cause was submitted on the brief of *Michael Levin.*

F. H. Gugel, for the respondent.

WINSLOW, C. J. The order of the circuit court must be affirmed. The moving papers in the civil court included an answer setting forth a complete defense and affidavits showing that the judgment had been suffered through "mistake, inadvertence, surprise, or excusable neglect." Under these circumstances it is an abuse of discretion to refuse to reopen

the case and allow the defense to be made. Sec. 2832, Stats.; *Bloor v. Smith,* 112 Wis. 340, 87 N. W. 870.

The court was entirely justified in imposing motion costs. Such costs, not exceeding $10, may be allowed on any motion. Sec. 2924, Stats. The hearing of an appeal from the civil court to the circuit court is brought on by motion. Sub. 4, sec. 28, ch. 549, Laws 1909.

Under the present statute regulating appeals to this court the order of the circuit court before us would not be appealable because it simply reverses an order of the civil court. Sec. 3069, Stats., as amended by sec. 9, ch. 219, Laws 1915.

By the Court.—Order affirmed.

TABAK, Appellant, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Respondent.

October 7—October 26, 1915.

Street railways: Injury to passenger: Jerking of car in starting: Negligence: Special verdict: Construction: Omissions: Decision by court.

1. The mere fact that a street car was suddenly jerked when it started, causing a passenger to fall, does not in itself establish negligence in the starting.
2. In an action for injuries to a passenger who fell while going from the platform to the inside of a street car, findings by the jury that the car was suddenly jerked so as to cause such fall and that the jerking was not due to any negligence of the motorman, are construed as showing no more than that the car started with the ordinary jerking of an electric street car in its usual operation.
3. Where counsel for the respective parties were required by the trial court to specify their objections to the questions prepared by the court for a special verdict, but did not call attention to the omission of any controverted matter of fact, any such matter so omitted will be deemed, under sec. 2858*m*. Stats., to have been determined by the court in conformity with its judgment.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

This is an action for damages for personal injuries sustained by the plaintiff while a passenger on one of defendant's street cars.

The plaintiff is a married woman thirty-five years of age. The defendant operates electrically propelled street cars in the city of Milwaukee and carries passengers for hire. On April 22, 1914, in the forenoon, the plaintiff with a friend, one Mrs. Cucu, boarded one of defendant's cars which was being operated on Thirty-fifth street. After getting onto the platform of the car and attempting to step into the aisle of the car, and while reaching in her sweater pocket for her transfer, the car started and the plaintiff was thrown to the floor. There is a step leading from the platform into the car, and the plaintiff was thrown across this step in such a way that her omentum was torn so as to necessitate an immediate operation. The plaintiff alleges in her complaint that the car started with a sudden jerk, caused by the negligence of the defendant, and the plaintiff and Mrs. Cucu both testified at the trial that the car did start with a jerk. One Mr. Gaulke, who boarded the car at the same place, testified that there was no jerk, and so did the conductor.

By a special verdict the jury found that the car was suddenly jerked; that the motorman was not negligent in operating the car; that no want of ordinary care on the part of the plaintiff proximately contributed to produce her injury; and assessed plaintiff's damages at $1,500.

An order was entered denying plaintiff's motion for judgment on the verdict and for a new trial and granting defendant's motion for judgment on the verdict. This is an appeal from the judgment in defendant's favor.

For the appellant there was a brief by *Rubin, Fawcett & Dutcher,* attorneys, and *W. B. Rubin* and *Paul R. Newcomb,* of counsel, and oral argument by *W. B. Rubin.* They cited,

among other cases, *Fitch v. Mason City & C. L. T. Co.* 124 Iowa, 665, 100 N. W. 618; *Smith v. St. Paul City R. Co.* 32 Minn. 1, 18 N. W. 827, 828; *New Jersey R. & T. Co. v. Pollard,* 22 Wall. 341; *O'Callaghan v. Dellwood Park Co.* 242 Ill. 336, 89 N. E. 1005; *Louisville, N. A. & C. R. Co. v. Jones,* 108 Ind. 551, 9 N. E. 476; *St. Louis, I. M. & S. R. Co. v. Holmes,* 96 Ark. 339, 131 S. W. 692; *Consolidated T. Co. v. Thalheimer,* 59 N. J. Law, 474, 37 Atl. 132; *Copeland v. Omaha & C. B. St. R. Co.* (Neb.) 151 N. W. 947; *Irvine v. D., L. & W. R. Co.* 184 Fed. 664, 671; *Lee Line Steamers v. Robinson,* 218 Fed. 559, 563; *Gleeson v. Va. M. R. Co.* 140 U. S. 435, 443, 11 Sup. Ct. 859; *Weber v. C., R. I. & P. R. Co.* (Iowa) 151 N. W. 852; *Harden v. C., M. & St. P. R. Co.* 102 Wis. 213, 78 N. W. 424; *Spencer v. C., M. & St. P. R. Co.* 105 Wis. 311, 313, 81 N. W. 407; *Hopkins v. C., M. & St. P. R. Co.* 128 Wis. 403, 107 N. W. 330; *Otto v. Milwaukee N. R. Co.* 148 Wis. 54, 134 N. W. 157; *Kinziger v. C. & N. W. R. Co.* 156 Wis. 497, 146 N. W. 518; *Hewitt v. Southern Wis. R. Co.* 159 Wis. 309, 150 N. W. 502.

For the respondent there was a brief by *Van Dyke, Shaw, Muskat & Van Dyke,* and oral argument by *Carl Muskat.*

Siebecker, J. The jury by their special verdict found that the car, when started, was "suddenly jerked," which caused the plaintiff to fall onto the floor of the car while going from the platform to the inside of the car. The plaintiff described the start of the car as follows: "It started so fast and jerked;" "The car went backward and forward;" "It was fast;" "When I got in the car the car started immediately and it started so suddenly;" "It jerked up and down, and I fell." Mrs. Cucu, sworn as a witness, testified that she boarded the car with the plaintiff, that plaintiff followed her and was "right behind" her, and that the car "jerked;" that plaintiff fell against her foot; that she was then stepping

in the car when the car started and jerked and the plaintiff fell. A Mr. Gaulke boarded the car at the same time, was ahead of the ladies, and did not observe any jerk or motion of the car before plaintiff fell. The conductor testified that the car had not started when the plaintiff fell, and the motorman states he did not know that plaintiff had fallen until she was removed from the car. The jury found that the jerking of the car was not due to any negligence of the motorman. The court held that the finding of the jury that plaintiff's fall was caused by a sudden jerk of the car did not, under the facts and circumstances shown, justify the inference that defendant was guilty of negligence in starting the car. The court construed the finding in question 1 of the verdict as showing no more than that the car started with the ordinary jerking of an electric street car in its usual operation. We are of the opinion that this conclusion of the trial court was correct. The fact that the car suddenly jerked when it started does not in itself establish negligence. *McGann v. Boston E. R. Co.* 199 Mass. 446, 85 N. E. 570; *Boston E. R. Co. v. Smith,* 168 Fed. 628; *Bradley v. Ft. W. & E. R. Co.* 94 Mich. 35, 53 N. W. 915; *Otto v. M. N. R. Co.* 148 Wis. 54, 134 N. W. 157.

It is contended that under this ruling of the court in construing the effect of the verdict it was error not to grant plaintiff a new trial upon the ground that the special verdict as construed by the court made it an incomplete verdict. At the time the case was submitted to the jury upon the special verdict rendered, counsel for the respective parties were required by the court to specify their objections to the verdict as prepared by the court and no controverted matter of fact was brought to the attention of the court as omitted from the verdict. Under this state of the record the provision of sec. 2858*m*, Stats. 1913, controls, and it must be considered that any omitted controverted matter of fact not included in the verdict was determined by the court in conformity with the

judgment. The record, however, discloses that the court determined the issues of negligence upon the evidence before it. In the written memorandum decision of the court on the motion for a new trial the court states:

"The evidence discloses that at the time the car was jerked the plaintiff was going from the platform to the inside of the car proper. She was standing apparently in a safe place. The mere fact that while she was in that position there was a sudden jerk of such car as caused her to be thrown, does not in and of itself entitle her to recover. Negligence in some respect on the part of the defendant, or for which the defendant is chargeable, must also be affirmatively established. (Citing.) The jury has expressly found that there was no negligence on the part of the motorman in operating the car. There is no evidence that there was any defect in the car or the tracks."

This is a determination of the questions not included in the verdict and the record sustains the conclusions of the court. There is no reversible error shown by the record.

By the Court.—The judgment appealed from is affirmed.

City of Milwaukee, Respondent, vs. Filer & Stowell Company, Appellant.

October 7—October 26, 1915.

Municipal corporations: Power to regulate steam engines, etc.: Licensing of engineers.

1. Power to regulate, given to a municipal corporation, ordinarily includes the power to license when necessary to proper regulation.
2. Considered in connection with sec. 925—52c, Stats., relating to the construction of powers conferred upon cities of the first class, the power given to the city of Milwaukee "to provide for the inspection and regulation of stationary engines and boilers" includes power to require the licensing of engineers for such engines and boilers.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

This action was brought by the city of *Milwaukee* to recover a penalty on breach of ordinance relating to stationary and portable boilers. It is charged that the defendant owned and controlled a certain steam power plant and authorized and permitted certain persons without a proper and valid license, as required by ordinance, to operate, manage, and take charge of a steam power plant while working under pressure, and that said defendant became subject to the penalty provided in the ordinance.

The defense is want of power by the city to pass the ordinance. Power is claimed by plaintiff under the charter provision "to provide for the inspection and regulation of stationary engines and boilers." The ordinance provides that it shall be unlawful for any person to operate any stationary or portable steam boiler, engine, or any portion of a steam plant or appliance connected therewith in the city of *Milwaukee* when working under pressure, except by an engineer who has been duly licensed so to do and who shall exhibit a certificate thereof as provided in the ordinance.

The defendant was found guilty of violating the ordinance and fined, and appealed from the judgment to this court.

For the appellant there was a brief by *Glicksman, Gold & Corrigan,* attorneys, and *Joseph E. Tierney,* of counsel, and oral argument by *W. L. Gold.*

For the respondent there was a brief by *Daniel W. Hoan,* city attorney, and *E. L. McIntyre,* assistant city attorney, and oral argument by *Mr. McIntyre.*

KERWIN, J. Whether the city had power to pass the ordinance under the charter, providing "for the inspection and regulation of stationary engines and boilers," is the only question involved upon this appeal. Counsel for appellant relies upon *Chain Belt Co. v. Milwaukee,* 151 Wis. 188, 138

N. W. 621; *Ogden v. Madison,* 111 Wis. 413, 87 N. W. 568; *Wis. T. Co. v. Oshkosh,* 62 Wis. 32, 21 N. W. 828, and some foreign authorities.

In the *Chain Belt Co. Case* authority to pass the ordinance was claimed under the welfare clause, and this court held that it could not be implied from the "general welfare" clause in the charter. An examination of the *Chain Belt Co. Case* will show that it is clearly distinguishable from the instant case in many particulars, some of which will be referred to later.

Ogden v. Madison, supra, states the general rule, viz. that municipal corporations possess and can exercise only such powers as are granted in express words; such as are necessarily implied in or incident to the powers expressly granted; and those essential to the declared objects and purposes of the corporation.

The case of *Wis. T. Co. v. Oshkosh, supra,* involved a question of license for revenue. The city sought by ordinance to charge the telephone company $300 per year for the right to operate in the streets, and it was held that the common council was without power to do so.

In the instant case the ordinance was passed for regulation solely. The power to regulate ordinarily includes the power to license when such power is necessary to proper regulation. We think the weight of authority is to the effect that the power to regulate implies the power to license when in aid of regulation.

In the *Chain Belt Co. Case* this court refers to the rule of strict construction and says that the power to license cannot be implied under the general welfare clause. Since the decision of that case, however, we have had some legislation on the subject, sec. 925—52*c*, being ch. 678, Laws 1913. This legislation was intended to broaden the powers of cities of the first class.

It seems clear under the general charter power to regulate

and the above statute that the city had power to pass the ordinance in question. *Mehlos v. Milwaukee,* 156 Wis. 591, 146 N. W. 882; *Cream City B. P. Co. v. Milwaukee,* 158 Wis. 86, 147 N. W. 25; 3 McQuillin, Mun. Corp. § 989; *Trigg v. Dixon,* 96 Ark. 199, 131 S. W. 695; *Kinsley v. Chicago,* 124 Ill. 359, 16 N. E. 260; 25 Cyc. 602.

Whether the city would have power in aid of regulation to pass the ordinance in question in the absence of sec. 925—52*c* we need not and do not determine.

By the Court.—The judgment of the court below is affirmed.

STATE EX REL. MCLOGAN, Respondent, vs. BURKE, Appellant.

October 7—October 26, 1915.

Constitutional law: Justices of the peace: Limiting number.

Under sec. 15, art. VII, Const. (providing that the number and classification of justices of the peace to be elected in towns, cities, and villages shall be regulated by law, and that they shall have such civil and criminal jurisdiction as shall be prescribed by law), the legislature had power (by ch. 468, Laws 1911) to limit the number of justices in cities of the first class to one, leaving that one clothed with extensive civil jurisdiction and many important powers and duties, fixing a moderate salary for him, and imposing no handicap preventing the acceptance of or holding the office. *State ex rel. Burke v. Hinkel,* 144 Wis. 444, distinguished.

APPEAL from a judgment of the circuit court for Milwaukee county: GEO. W. BURNELL, Judge. *Affirmed.*

The judgment appealed from was one of ouster in *quo warranto.*

For the appellant there was a brief by *Glicksman, Gold & Corrigan,* attorneys, and *Joseph E. Tierney,* of counsel, and oral argument by *Mr. Tierney* and *Mr. W. L. Gold.*

For the respondent there was a brief by *Daniel W. Hoan* and *Clifton Williams,* and oral argument by *Mr. Williams.*

Timlin, J. In response to the inquiry by what warrant he claims to hold and exercise the functions of the office of justice of the peace in the city of Milwaukee, the defendant shows that he is one of eleven justices of the peace by former statute authorized to be elected in and to hold and exercise that office in said city and that he holds over after the expiration of the term for which he was elected by force of sec. 15, art. VII, Const. He contends that his successor was never lawfully elected or qualified, because, although the relator was elected and qualified as sole justice of the peace for said city on a salary as enacted in chs. 468, 423, and 424, Laws 1911, these statutes are in conflict with the constitution of the state and therefore invalid.

Our constitution vests the judicial power of the state in an elective supreme court, elective circuit courts, courts of probate, and justices of the peace; with a further provision to the effect that the legislature may also establish other inferior courts. Const. art. VII, sec. 2. Former statutes plainly intended to abolish the office of justice of the peace in said city were held unconstitutional in *State ex rel. Burke v. Hinkel,* 144 Wis. 444, 129 N. W. 393. The constitution doubtless regards more the well known jurisdiction and duties of this office than the mere name of the office, but the name is also to be preserved. *State ex rel. Burke v. Hinkel, supra.* It was doubtless considered that the scheme of a wise and useful state government would be incomplete without a popular peace officer and judicial tribunal near to the people and to which the latter might resort without much delay or expense to maintain the local peace and for the decision of petty private differences. But it is probable that no one, at the time of the adoption of our constitution, foresaw the effect of the present industrial system in large cities nor the presence

therein of large numbers of industrial nomads who move from ward to ward, city to city, state to state, and also from foreign countries in search of sustenance, and have no property and no substantial interest in local affairs or local government, yet within the very liberal provisions of our domiciliary laws are electors. Eleven justices of the peace for Milwaukee meant one justice to 30,000 or 35,000 people—about ten times the number of people to each justice found in the rural districts. The fee system of compensation, always a temptation to such officers to encourage litigation, multiply costs, and decide in such a way as to tax costs against the party from whom they could be collected, had in the rural districts its baleful influence checked or restrained by the smaller and more stable constituency and by the more intimate acquaintance and "elbow touch" of the officer and electors. In such surroundings the doings of the officer were generally known, discussed, and criticised, and he naturally expected to be, and usually was, held to swift accountability at the next election. In the large cities these restraints were lacking, the reward of wrongdoing was larger, the necessities of the officer more pressing, for the "hand to mouth" style of living was more prevalent. Hence in the large cities the fee system brought this ancient and honorable office into disrepute. There was a known mischief to be remedied. This could have been accomplished by putting these officers on a salary and forbidding them to tax their fees as costs. But the legislature, within the constitution, has the choice of means. There is in the constitution express recognition of the power of the legislature to determine the number of such officers to be elected in any town, village, or city, and also to fix their civil and criminal jurisdiction. Sec. 15, art. VII, Const. Hence, while the legislature might take away all criminal jurisdiction (*Gilowsky v. Connolly,* 55 Wis. 445, 13 N. W. 444), it could not take away substantially all jurisdiction (*State ex rel. Burke v. Hinkel,* 144 Wis. 444, 129 N.

W. 393); and while it could not abolish the office altogether, either directly or by indirection (*State ex rel. Burke v. Hinkel, supra*), we must hold that it could, under its power to fix the number to be elected in any city, fix that number at one, and of course put that one, as it might have put all, upon a salary. The legislature is always permitted to search the constitution for the limits on its power and to go to, but keep within, these limits. It is not permissible to disregard these limits either openly and boldly or by plausible subterfuge, but we are not to impute improper motives to the legislature. This legislation limits the number of the justices in cities of the first class to one, but leaves that one clothed with extensive civil jurisdiction and many important powers and duties, fixes a moderate salary for him, and imposes no handicap preventing the acceptance of or holding the office, and in these it is distinguished from *State ex rel. Burke v. Hinkel, supra.* At the same time other statutes authorize and establish in said city inferior courts which exercise the jurisdiction formerly conferred on justices of the peace.

By the Court.—Judgment affirmed.

CHUDNOW, Appellant, vs. KETTER, Respondent.

October 8—October 26, 1915.

Vendor and purchaser of land: Validity of contract: Statute of frauds: Uncertainty: Resort to public records: Matters resting in parol: Rents and taxes.

1. A written contract by which defendant agreed to sell to plaintiff for a specified price a lot described therein, "free and clear of all liens and incumbrances, except as to the interest of the minor child of nineteen years, on account of whom matters will be arranged according to oral agreement with Richard Elsner until such child becomes of age; otherwise warranty deed and full abstract of title will be furnished free of charge and free of de-

fects," was not void under the statute of frauds (sec. 2304, Stats.). The agreement was to sell the lot except the interest of the minor therein; the price named was not for the entire fee in the land, but only for so much of it as the minor did not own; and the public records might properly be resorted to to ascertain what the respective interests of the defendant and the minor were.

2. A further provision in such contract that "the rents and taxes will be adjusted at the time of the delivery of the deed," did not show that there was any agreement as to those matters resting in parol, and did not render the contract void.

3. It is not necessary that a valid contract to convey land should contain any provision as to the adjustment of rents or taxes, the rights of the parties in those matters being fixed by law.

APPEAL from an order of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Reversed.*

For the appellant the cause was submitted on the brief of *Stern & Padway,* attorneys, and *Churchill, Bennett & Churchill,* of counsel.

For the respondent there was a brief by *Reukema & Lemke,* and oral argument by *Otto A. Lemke.*

BARNES, J. This action was brought to enforce specific performance of the following agreement:

"Milwaukee, June 22, 1914.

"Received of *Isidor Chudnow* one hundred dollars in consideration of which I agree to sell to him Lot 4, in Block 100, in the 6th Ward of the city and county of Milwaukee, for the price of seven thousand and five hundred dollars, provided he pay me as soon as the papers are ready the balance of $7,400.00, free and clear of all liens and incumbrances, except as to the interest of the minor child of 19 years, on account of whom matters will be arranged according to oral agreement with Richard Elsner until such child becomes of age; otherwise warranty deed and full abstract of title will be furnished free of charge and free of defects. The rents and taxes will be adjusted at the time of the delivery of the deed."

The document was signed, sealed, and acknowledged by

both parties. The defendant demurred to the complaint as not stating a cause of action, which demurrer was sustained, the court concluding that the contract was void under the statute of frauds (sec. 2304, Stats.).

The vendor agreed to sell the real estate described free and clear of all liens and incumbrances except the interest of the nineteen-year-old minor. It seems pretty clear that the consideration named was not for the entire fee in the land, but only for so much of it as the minor did not own. Complaints must be construed liberally on demurrer.

Presumably a nineteen-year-old minor owned some interest in the premises contracted to be sold. Inasmuch as defendant agreed to sell the remaining interest, it is a fair presumption that she owned it and that the public records of Milwaukee county would disclose just what the respective interests of these parties were. The contract is definite and certain except upon this point, and we think it clear that the public records might be resorted to to ascertain what the respective interests of the defendant and the minor were, without running counter to the statute of frauds. *Harney v. Burhans,* 91 Wis. 348, 64 N. W. 1031. Respondent's counsel do not claim otherwise, but they construe the writing as obligating the defendant to convey the entire lot. If we deemed this construction to be the correct one, the conclusion reached by the trial court would no doubt be correct. Construing the contract as we do, we hold that the provision therein in reference to the interest of the minor does not violate the statute referred to. The complaint does not show on its face that the contract is void because of the uncertainty referred to.

It is also argued that the provision that "the rents and taxes will be adjusted at the time of the delivery of the deed" renders the contract void. It will be observed that the document does not recite that any agreement has been reached in reference to an adjustment of those matters. Consequently

there is no contract in reference to them resting in parol. It is not necessary that a valid contract to convey real estate should contain any provision in reference to the adjustment of rents or taxes. The common law defines those rights in reference to rents, and sec. 1153, Stats., defines them in reference to taxes.

By the Court.—Order reversed, and cause remanded with directions to overrule the demurrer to the complaint.

SULZER, Respondent, vs. MOYER, imp., Appellant.

October 8—October 26, 1915.

Contracts: Construction: Validity: When performance optional: Escrow: Agreement to furnish money and assume liabilities: Definiteness: Corporations: Preference of creditors.

1. The fact that a contract gives one party the option to cancel it upon a certain contingency does not make its performance optional with the other party.
2. By a written contract with officers and stockholders of a corporation as parties of the second part, defendants in substance agreed, first, to "make diligent efforts to purchase all of the outstanding merchandise claims" against the corporation on a basis of fifty cents on the dollar and to furnish the money therefor, or, failing in that, second, to furnish the money for a composition, to be offered by the corporation in bankruptcy, of fifty cents on the dollar, or, if that was not satisfactory to creditors or approved by the court, third, to bid at the sale in case the property of the corporation should go to a bankruptcy sale, and that, if they succeeded in so purchasing the claims or in making such composition agreement or if they purchased the property at a bankruptcy sale, they would in either case assume the liability of said second parties as indorsers upon certain notes of the corporation. As part of the consideration the second parties were to transfer to defendants their shares in the corporation; and such shares and the contract were placed in escrow. The contract was to be performed within thirty days. *Held*, that the contract was not too vague or indefinite to be enforced in law.

3. The fact that the composition agreement contemplated in such contract would result in those creditors who held the indorsed notes being paid in full, while other creditors received but fifty cents on the dollar, does not make the contract illegal, since the payment of such notes was to be made, not out of corporate funds or property, but out of the individual funds of defendants, which were not impressed with any trust in favor of creditors of the corporation.

Appeal from an order of the circuit court for Milwaukee county: J. C. Ludwig, Circuit Judge. *Affirmed.*

Action to recover damages for breach of contract. In November, 1913, a corporation operating a department store in Milwaukee, known as Leflys, was financially embarrassed. James Harris, its president; Sam E. Blinkenstine, its secretary; *Louis Sulzer,* its treasurer; and Leo D. Lefly, its vice-president and general manager, had become liable on its paper as indorsers to the amount of $92,000. On the 20th of November they entered into an agreement with the defendants whereby the latter agreed to assume their liability as indorsers upon their transfer to them of their shares of stock in the corporation, their resignation from their respective offices, and a cessation of their salaries from the date of the agreement, provided the defendants were able within thirty days to secure an extension of the time of payment of $75,000 of the indebtedness of the Leflys corporation. It soon became apparent that an extension of time could not be secured from the requisite number of creditors. So on November 24th another agreement was entered into between *Maurice Moyer* and James Harris as parties of the first part and *Louis Sulzer,* Sam E. Blinkenstine, and Leo D. Lefly as parties of the second part whereby the defendants in substance agreed, first, to make diligent efforts to purchase all of the outstanding merchandise claims of Leflys on a basis of fifty cents on the dollar and to furnish the money therefor, or, failing in this, second, to furnish the money for a composition to be offered by Leflys in bankruptcy of fifty cents on the

dollar, or, failing in this being satisfactory to creditors or approved by the court, third, to bid at the sale in case the property of the Leflys should go to a bankruptcy sale, and if they succeeded in purchasing the claims at fifty cents on the dollar, or in making a composition agreement at fifty cents on the dollar approved by the court, or if they purchased the property at a bankruptcy sale, they would in either case assume the liability of the parties of the second part as indorsers to the amount mentioned. The contract was to be performed within thirty days from its date. Both contracts, stock, and resignations from office were delivered in escrow to the Wisconsin Trust Company. The plaintiff succeeded to the rights of Blinkenstine and Leflys.

The complaint sets out these contracts and alleges that the defendants failed to make diligent efforts to purchase the outstanding merchandise claims of Leflys; failed to furnish the money therefor; failed to furnish the money for a composition agreement; and failed to bid at the bankruptcy sale, though the property of Leflys was sold at such sale, whereby plaintiff sustained damages in the sum of $92,000. From an order overruling a general demurrer to the complaint the defendant *Moyer* appealed.

For the appellant there was a brief by *Leon B. Lamfrom*, attorney, and *James G. Flanders*, of counsel, and oral argument by *Mr. Lamfrom* and *Mr. C. E. Monroe*.

For the respondent there was a brief by *Quarles, Spence & Quarles*, attorneys, and *J. V. Quarles*, of counsel, and oral argument by *J. V. Quarles*.

VINJE, J. The appellant claims, first, that the contracts were mere options; second, that they were too vague and indefinite to be enforced in law; and third, that the second contract is illegal. The first two claims can best be negatived by the language of the second contract itself. It reads:

"Now, therefore, the parties of the first part, for and in

consideration of the covenants hereinafter contained, hereby agree that they will make diligent efforts to purchase all of the outstanding merchandise claims of Leflys on a basis of fifty cents ($.50) on the dollar ($1) and will furnish the money therefor; that as soon as the said parties of the first part have succeeded in obtaining, either by purchase or by agreement to accept said percentage or otherwise, fifty-one per cent. (51 %) of said outstanding unsecured claims in number and amount, that said parties of the first part will forthwith perform said escrow agreement and forthwith assume the obligations of said parties of the second part therein mentioned and relieve them of all further liability thereon, or will forthwith cause to be submitted the composition hereafter mentioned.

"In case said parties of the first part shall find it impossible to obtain fifty-one per cent. (51 %) of the outstanding unsecured claims of Leflys at fifty cents ($.50) on the dollar ($1), they will furnish the money for a composition to be offered by Leflys in bankruptcy of fifty cents ($.50) on the dollar ($1); that if said composition is approved by the court, that upon said approval said parties of the first part will forthwith perform said escrow agreement, assume liability of said parties of the second part therein mentioned, and relieve said parties of the second part of all liability thereon.

"In case the property of said Leflys shall go to a bankruptcy sale, in that event said parties of the first part agree to bid therefor at said sale, and in case they or either of them shall purchase said property or any part thereof at such sale or shall obtain any interest of any kind, either directly or indirectly, in said property through said sale, they will thereupon perform said escrow agreement, assume the liability of said parties of the second part therein mentioned, and relieve them of all liability thereon."

We fail to see any vagueness or uncertainty in the language used. It provides in clear specific language just what the defendants obligated themselves to do. The fact that the contract gave the parties of the second part the option to cancel it upon a certain contingency does not make its performance optional with the defendants.

The claim that the second agreement is illegal because the

composition agreement therein contemplated provides for the payment of some of the creditors of Leflys in full and of others only fifty cents on the dollar is not tenable. It is true that the agreement, if carried out, would result in those creditors who held paper indorsed by plaintiff and his assignors being paid in full and the others only fifty cents on the dollar. But such payments were not to be made out of corporate funds or property, but out of the individual funds of the defendants. Their individual funds were impressed with no trust in favor of creditors of the corporation. They could use them to pay any debts of the corporation they chose in full or in part. No creditor could thereby be prejudiced, for any payment made by defendants out of their individual funds would reduce corporate liabilities without diminishing corporate assets. Had the agreement been to pay some creditors in full out of corporate assets, another question would have been presented.

By the Court.—Order affirmed.

NIEDERFRIEDRICH, Appellant, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Respondent.

October 8—October 26, 1915.

Street railways: Collision with vehicle on track: Contributory negligence: Gross negligence.

1. In an action for injuries sustained when a north-bound street car struck plaintiff's wagon from the rear, the evidence most favorable to plaintiff—showing, among other things, that he drove slowly northward on the north-bound track of a double street railway track for more than 250 feet without looking to the rear, during the greater portion of which time he could have seen the approaching car had he looked, and that there was ample room to travel elsewhere than on the track in safety and comfort,—is *held* to show contributory negligence as matter of law.

2. The conclusion of the trial court that there was no evidence that the motorman of the car was guilty of gross negligence is *held* not so clearly wrong that it should be disturbed.

Appeal from a judgment of the circuit court for Milwaukee county: Oscar M. Fritz, Circuit Judge. *Affirmed.*

Personal injuries resulting from a street-car collision. Both negligence and gross negligence on the part of the motorman are alleged in the complaint. At the close of the evidence the trial judge directed a verdict for the defendant and the plaintiff appeals. The evidence tended to show the following facts: At about 8:30 o'clock on the morning of June 18, 1914, the plaintiff, a painter and decorator, was driving north on Thirty-fifth street in the city of Milwaukee in a light wagon containing painters' supplies and drawn by one horse. The street has a double railway track and runs due north and south. It is crossed by Chestnut street, which runs due east and west. Thirty-fifth street is not paved, and the space to the east of the double track was in bad condition for travel, hence teams and vehicles used the space occupied by the tracks and space west of the tracks for travel. Plaintiff came into Thirty-fifth street from the west on Chestnut street. As he drove in to Thirty-fifth street he looked south on that street and saw no car. Thirty-fifth street slopes to the north from a point about a block south of its intersection with Chestnut street. From that intersection a car approaching from the south could be seen at a distance of 587 feet and no more. Plaintiff was familiar with the street. He testifies that he looked south again after crossing the north crosswalk of Chestnut street ten or fifteen feet, but saw no car; he was then driving on the street-car tracks with his right wheels between the east or north-bound rails, and his left wheels between the two tracks; he drove north with his horse at a slow walk and without looking back until he came nearly or quite to the south line of the Steinman lumber yard on the west side of the street, which is 318 feet north of the north line of

Chestnut street; here he heard a car coming from the south and looked around, saw that it was within ten or fifteen feet of him, turned his horse and wagon sharply to the west, but was unable to escape entirely from the danger zone, and the car struck the hub of the right-hand rear wheel, throwing the wagon suddenly forward and upward and precipitating him over the front thereof, while the horse ran away. The evidence of the motorman was to the effect that the plaintiff was driving on the south-bound track as the car approached on the north-bound track; that the wagon was far enough to the west to be clear of the overhang of the car; and that as the car reached about the rear of the wagon the plaintiff turned to the right and the car struck the rear wheel of the wagon. The axles of the wagon were bent, the reach broken, and a step on the right shaft broken off. The estimates as to the speed of the car varied from ten or twelve to twenty or twenty-five miles per hour.

For the appellant there was a brief by *Carl H. Juergens,* attorney, and *Schmitz, Wild & Gross,* of counsel, and oral argument by *Mr. E. J. Gross* and *Mr. Juergens.*

For the respondent there was a brief by *Van Dyke, Shaw, Muskat & Van Dyke,* and oral argument by *James D. Shaw.*

WINSLOW, C. J. The trial judge held that, construing the evidence most favorably to the plaintiff, it appeared that he traveled northward on the north-bound track more than 250 feet without looking to the rear, and that during the greater part of that time he could have seen the approaching car had he looked. This he held to constitute contributory negligence. The trial judge further held that the evidence would not justify a finding of gross negligence.

It is not possible for us to say that the conclusion of the trial judge as to the plaintiff's contributory negligence was clearly wrong; in fact it seems to have been clearly right. *McClellan v. Chippewa Valley E. R. Co.* 110 Wis. 326, 85

N. W. 1018. This is not the case of a highway all parts of which are impassable or dangerous except the part occupied by the street railway track, as was the case of *Kowalkowski v. M. N. R. Co.* 157 Wis. 473, 146 N. W. 801. There was ample room to travel elsewhere than on the track in safety and comfort, but the plaintiff (if we are to believe his own story) chose to travel on a track which he knew was used by cars going northward and never looked back or took the slightest precaution for his own safety while his horse slowly walked about 300 feet.

Another consideration seems very persuasive. The conceded facts amount almost if not quite to a demonstration that the plaintiff was not, as he claims, traveling on the north-bound track, but that he turned into that track from the west and without looking just before the car struck him. It is undisputed that the wagon was first struck on the hub of the right rear wheel, that the car then scraped along the side of the wagon, striking the hub of the right front wheel, and knocking off the small iron step projecting out from the right shaft. This seems practically impossible if, as plaintiff testifies, his wagon was on the track and he turned quickly to the west to get out of the way of the car. In this event the car, if it struck the wheel at all, must necessarily strike the felly rather than the hub, and the car could never scrape along the side of the wagon as was the case here. On the other hand, this would be the result naturally to be expected if the plaintiff was just turning upon the track when the car struck the wagon.

As to the claim that there was evidence of gross negligence which should have gone to the jury, the answer is not so plain, but we are entirely satisfied that it cannot be said that the trial judge was wrong in his conclusion.

By the Court.—Judgment affirmed.

HEILEMAN BREWING COMPANY, Appellant, vs. SHAW and another, Respondents.

October 8—October 26, 1915.

Workmen's compensation: Accidental injury while performing service growing out of and incidental to employment: Evidence: Sufficiency.

Where a night workman, whose duties took him to all parts of the bottling house of a brewery, was found between 8 and 9 o'clock p. m. lying, unconscious and with bruises on his head and shoulder, on the basement floor beneath a guarded temporary opening in the floor above, and died on the following morning, findings by the industrial commission that his death was caused by an accidental injury sustained while he was "performing services growing out of and incidental to his employment," were not wholly unsupported by the evidence, although there was no direct evidence showing what he was doing at the time.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

This is an action to set aside an award of the *Industrial Commission* requiring the appellant company to pay to *Hulda Shaw* $3,000 on account of the death of her husband, James Shaw, caused by accident while in the employ of the appellant company. The circuit court affirmed the award and the plaintiff company appeals.

The decedent had been employed as night workman by the plaintiff company. His duties consisted mainly of cleaning up after the day force had left and turning on the steam in the pasteurizing machines, and his hours were from 6 o'clock in the evening until 6 o'clock in the morning. The plaintiff company had erected a building containing a large room in which there were various kinds of machinery. On November 15, 1914, the time of the accident, a large opening had been made in the first floor of this building preparatory to installing a pasteurizing machine. Surrounding this opening

there had been placed beer boxes with planks upon them for a guard or railing. This railing was placed at the edge of the opening.

The decedent had done the cleaning of the building on Saturday night and Sunday morning and the brewery did not operate on Sunday, November 15, 1914, the date of the accident. No one saw decedent in the building before he fell and there is no direct evidence showing what he was doing at this time. Decedent was required to turn on the steam in the pasteurizing machines sometime between midnight and 4 o'clock in the morning. This could be done from the basement floor.

Between 8 and 9 o'clock on the night of the accident the engineer and the assistant engineer were going through the building when they discovered an object on the basement floor. Upon closer examination this proved to be the body of decedent, and he was unconscious. He was removed to a hospital and died there the following morning. There was an abrasion on the back of the head and one shoulder was bruised. The finger nails of one of his hands were turned back. On the middle of one of the planks at the north edge of the opening there was an opened bottle of beer with the contents untouched.

The applicant is the wife of the deceased, and the *Commission* awarded her the maximum amount provided by the Compensation Act on account of his death.

For the appellant there was a brief by *Robert R. Freeman* and *Timothy Brown,* and oral argument by *Mr. Brown.*

For the respondent *Industrial Commission* there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

Siebecker, J. The *Industrial Commission* found that the decedent at the time of the accident was in plaintiff's employ and "performing services growing out of and incidental

to his employment," and that he "accidentally sustained personal injury, which said injury caused his death. . . ." The *Commission* properly concluded from the evidence that decedent's duties under plaintiff's employment required of him performance of services within the various parts of the bottling house. In passing on the claim for compensation the *Commission* declared that "the circumstances show an accidental injury" and that "there is no evidence in the case whatever to indicate suicide. . . . As the duties of the deceased took him to all parts of the building, it must be likewise presumed that he was injured in the course of his employment." There is no dispute that decedent's duties began at 6 o'clock in the evening and continued to 6 o'clock in the morning, including the night from Sunday evening to Monday morning. There is evidence to support the inference that he on Sunday evenings usually went to the part of the building where he fell and that at times on Sunday evening he performed services in any part of the building. Under such circumstances it cannot be said that the *Commission's* finding that decedent was injured in the course of his employment is wholly unsupported by the evidence. The facts and circumstances of the case amply support the conclusion of fact that decedent accidentally sustained a personal injury which caused his death and that it was incidental to his employment. This state of the case calls for affirmance of the judgment of the circuit court upholding the award of the *Industrial Commission*. *International H. Co. v. Industrial Comm.* 157 Wis. 167, 147 N. W. 53; *Milwaukee Western F. Co. v. Industrial Comm.* 159 Wis. 635, 150 N. W. 998; *Northwestern I. Co. v. Industrial Comm.* 160 Wis. 633, 152 N. W. 416.

By the Court.—The judgment appealed from is affirmed.

EAGLE CHEMICAL COMPANY, Appellant, vs. NOWAK and another, Respondents.

October 8—October 26, 1915.

Workmen's compensation: Disability caused by accident: Evidence: Findings of industrial commission, when conclusive.

1. **A finding by the industrial commission that adenitis of the lymphatic glands in the groin, by which an employee was disabled, was the proximate result of an accidental injury sustained while he was engaged in loading a barrel of soap upon a wagon, is *held* to be supported by the evidence. WINSLOW, C. J., dissents.**
2. **If in any reasonable view of the evidence it will support either directly or by fair inference the findings of the industrial commission, such findings are conclusive upon the court.**

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

This is an appeal from a judgment confirming an award of the *Industrial Commission.*

The *Commission* found that "on June 22, 1914, applicant and respondent were both subject to the provisions of chapter 599, Laws of Wisconsin for 1913; that on said date, while in the employ of the respondent and performing service growing out of and incidental to his employment, applicant accidentally sustained personal injuries; that the injuries sustained were the proximate result of an accident and were not intentionally self-inflicted; that as a result of said accident the applicant was totally disabled from June 26 to November 29, 1914, a period of twenty-two weeks and two days; that at the date of the accident applicant's average weekly wage was $9.63 per week and that he is entitled to compensation at the rate of $6.26 per week during said period of total disability; that no compensation has been paid to the applicant herein; that on the direct order of the respondent company the applicant was furnished medical, surgical, and hospital treatment as follows: Dr. J. H. Hackett $130, St. Mary's Hospital

$66.30, and Dr. Alexander $1.75, and that the respondent is directly liable for said bills; that the above mentioned medical, surgical, and hospital treatment was furnished within the ninety-day period provided by law."

The *Commission* rendered the following memorandum decision:

"*Henry Nowak* is a young man about twenty-two years of age. While in the employ of the respondent on the 22d of June, 1914, he was engaged in loading a barrel of soap from a platform. The barrel weighed about 500 pounds, and *Nowak,* together with two others, was rolling it up a skid, *Nowak* being in the center and the other workmen being at the end of the barrel. *Nowak* slipped and the barrel came back suddenly, causing him to fall across the barrel. Very shortly thereafter he complained of his condition to his employer, Mr. Winbigeler, the manager of the company, who was one of the men loading the barrel with him. He was directed by Mr. Winbigeler to go to Dr. Malone for treatment. Later he went to the county hospital for treatment and consulted various doctors.

"On July 18th he consulted Dr. Hackett, on the advice of Mr. Winbigeler, and on July 20th went to St. Mary's Hospital and was operated upon. He did not recover from his malady after this operation, and later, in October, was treated at the Marinette Hospital. He finally recovered from his disability and went back to work on November 29, 1914. He made application to the *Commission* for compensation, claiming he had received a rupture.

"On the hearing it appeared that he did not suffer from a rupture but suffered from inflamed glands in the groin, and the *Commission* directed that the pleadings might be amended to conform to the proof. There is no dispute in this case about the serious nature of *Nowak's* malady. The only question is as to whether the injury which he suffered from is the proximate result of the accident which happened to him on the 22d of June. It was shown without controversy that he had adenitis of the lymphatic glands in the groin and that it became necessary to remove, by operation, a number of these glands to relieve and cure him. It likewise appears without controversy that adenitis is usually caused by infection, and

that infection is produced by poison entering through an opening in the tissues. The function of the lymphatic glands is to strain out the poison from the blood and preserve the general health. Under ordinary conditions the glands are able to respond to the demands upon them. Infection of the glands in question usually comes through gonorrhœal infection through the penis, but may come from other sources, as from infection of the lower limbs or from tuberculosis germs. It also appears that the condition found here may have come through the rupture of a blood vessel, resulting in hæmatoma, or an unabsorbed blood clot.

"The original examination of the man does not seem to have been carefully made. Before the operation in St. Mary's Hospital Dr. Hackett examined the man to discover if he had gonorrhœal infection, but was unable to find any evidence of such infection. As usual, the medical experts differed as to the cause of *Nowak's* injuries. We are unable to determine with absolute certainty what the original cause of the adenitis was. There is no question here but what the man received an accidental injury; that he complained of pain resulting from such injury shortly thereafter; that he consulted physicians and adenitis was apparent; that various operations followed in order to cure and relieve. We believe that the adenitis was either the direct result of the injury or that there were poisonous germs in the glands which would have been thrown off but for the injury. Assuming the presence of dormant infection, or infection which was harmless because of nature's ability to dispose of it, the proximate result of the accident was to lower the vitality and to light up the infection, with the serious results that followed.

"We think that *Nowak's* disability was the result of injury received by accident in the course of his employment and he is entitled to compensation.

"It should be noted here that *Nowak* was a very industrious and capable young man and has the good will and sympathy of his employer. He himself claims that he has never had any gonorrhœal infection, and in the absence of proof to the contrary we must assume that his statement is true.

"It appears from the evidence that Dr. Hackett's bill was $130, St. Mary's Hospital bill $66.30, and Dr. Alexander's

bill $1.75, all of which was incurred within ninety days after the accident. The bill at the Marinette and Menominee Hospital was incurred after the ninety days. These bills incurred within the ninety days were all on the direct order of the manager of the respondent company and the respondent is liable directly for the same.

"An award will be entered for compensation during the period of applicant's disability and the award will also direct the respondent to pay the hospital and doctor bills within the ninety days."

The court below in ordering judgment said:

"The evidence of the plaintiff that the barrel dropped back, hit him in the glands and on the leg and that it hurt his glands, when viewed in the light of the evidence of all the physicians and especially that of Dr. Hackett, is sufficient to support the finding and award of the *Commission* under well established rules."

For the appellant there was a brief by *Robert R. Freeman* and *Timothy Brown,* and oral argument by *Mr. Brown.*

For the respondent *Industrial Commission* there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

KERWIN, J. We have set out the findings and decision of the *Industrial Commission* in the statement of facts. Also the finding of the court below in ordering the award affirmed. The only question presented here is whether the award is supported by the evidence.

If in any reasonable view of the evidence it will support either directly or by fair inference the findings made by the *Commission,* such findings are conclusive upon the court. *Milwaukee v. Industrial Comm.* 160 Wis. 238, 151 N. W. 247; *Milwaukee C. & G. Co. v. Industrial Comm.* 160 Wis. 247, 151 N. W. 245; *Milwaukee Western F. Co. v. Industrial Comm.* 159 Wis. 635, 150 N. W. 998; *Kill v. Industrial Comm.* 160 Wis. 549, 152 N. W. 148. A careful reading of

the evidence convinces the court that the findings are supported by the evidence.

By the Court.—The judgment is affirmed.

WINSLOW, C. J. (*dissenting*). I think the award is wrong. The finding that the slight accident with the barrel was the proximate cause of the adenitis is founded on the merest conjecture. It is clear that there was no break or laceration of the skin, and it is equally clear that if the presence of the germs was due to a traumatic injury there must have been a break in the skin to give them entrance. As I read the testimony, no physician would venture a serious opinion that the respondent's disease was caused by the barrel incident. There was a bare possibility and no more. Awards cannot properly be founded on bare possibilities.

NORTHWESTERN FUEL COMPANY, Appellant, vs. INDUSTRIAL COMMISSION and another, Respondents.

May 6—November 16, 1915.

Workmen's compensation: "Loss" of arm, etc.: Impairment of use: Statute construed.

1. The "loss" of a member, within the meaning of the schedule in sub. (5), sec. 2394—9, Stats., means the actual physical severance of it, not an impairment of its use; and it was error to award compensation under that schedule to an employee for an injury by which, as the industrial commission found, he would be "partially permanently disabled in his left forearm to an extent equivalent to a one-half loss of said forearm."
2. The further provision in said sub. (5), sec. 2394—9, with respect to "all other cases in this class," refers to the injuries mentioned specifically in the schedule, and was not intended to include impairment occasioned by an injury not there named.
3. Injuries for which provision is not made in said schedule are to be compensated for under other general provisions of the statute.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

This is an appeal from a judgment affirming an award of the *Industrial Commission.*

The award provided that plaintiff pay the defendant *Leipus* compensation for an injury sustained by him by reason of which he was found by the *Commission* to be partially permanently disabled in his left forearm to an extent equivalent to a one-half loss of said forearm.

The award included an allowance of $9.37 per week, being sixty-five per cent. of the average earnings of *Leipus* for the period of his actual total disability from the time of the injury, October 6, 1913, to January 3, 1915, and also an additional allowance of $9.37 per week for 100 weeks.

For the appellant there was a brief by *Olin, Butler, Stebbins, Curkeet & Stroud,* and oral argument by *B. H. Stebbins.*

For the respondent *Industrial Commission* there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

For the respondent *Leipus* the cause was submitted on the brief of *Dietrich & Dietrich.*

The following opinion was filed June 1, 1915:

KERWIN, J. The question presented is whether the proper allowance of compensation was made. This involves the inquiry whether the proper construction was placed upon sec. 2394—9, Stats., by the *Industrial Commission* and the court below.

On October 6, 1913, the defendant *John Leipus,* while in the employ of the plaintiff as a laborer, sustained an injury to his left forearm resulting in a fracture of both bones thereof. The bones did not heal properly and several operations were performed thereon. The arm finally healed, but was left in a weakened condition. At the final hearing be-

fore the *Commission* it was found that *Leipus* had been totally incapacitated for work and that such incapacity would continue until January 3, 1915, after which last named date the *Commission* held that *Leipus* would "have a forearm that is functionally fifty per cent. of the normal forearm;" and further found "that by reason of said injury applicant will be totally disabled until January 3, 1915, and by reason of said injury will also be partially permanently disabled in his left forearm to an extent equivalent to a one-half loss of said forearm."

On these findings the *Commission* awarded *Leipus* for total disability sixty-five per cent. of his average weekly earnings for sixty-five weeks, and in addition awarded sixty-five per cent. of his average weekly earnings for 100 weeks, the 100 weeks being one half of the allowance for the loss of an arm at the elbow as provided by schedule of fixed compensation contained in sub. (5), sec. 2394—9, Stats.

The statutes relating to the matter under consideration provide in part as follows:

"Section 2394—9. Where liability for compensation under sections 2394—3 to 2394—31, inclusive, exists, the same shall be as provided in the following schedule:

"(1) Such medical, surgical and hospital treatment, . . . as may be reasonably required at the time of the injury and thereafter during the disability. . . .

"(2) If the accident causes disability, an indemnity which shall be payable as wages on the eighth day after the injured employee leaves work as the result of the injury, and weekly thereafter, which weekly indemnity shall be as follows:

"(a) If the accident causes total disability, sixty-five per cent. of the average weekly earnings during the period of such total disability. . . .

"(b) If the accident causes partial disability, sixty-five per cent. of the weekly loss in wages during the period of such partial disability.

"(c) If the disability caused by the accident is at times total and at times partial, the weekly indemnity during the periods of each such total or partial disability shall be in accordance with said subdivisions (a) and (b), respectively.

"(d) Said subdivisions (a), (b) and (c) shall be subject to the following limitations:

"In case of temporary or partial disability aggregate indemnity for injury to a single employee caused by a single accident shall not exceed four times the average annual earnings of such employee, and in case of permanent total disability aggregate indemnity for injury to a single employee caused by a single accident shall not exceed six times the average annual earnings of such employee.

"Total blindness of both eyes, or the loss of both arms at or near the shoulder, or of both legs at or near the hip, or of one arm at the shoulder and one leg at the hip, shall constitute permanent total disability. This enumeration shall not be exclusive but in other cases the commission shall find the facts.

"The aggregate disability period shall not, in any event, extend beyond fifteen years from the date of the accident.

. . . . . .

"(3) Where death proximately results from the injury . . .

"(a) In case the injured employee was permanently totally disabled, a sum equal to four times his average annual earnings, but which, when added to the disability indemnity paid and due at the time of death, shall not exceed six times his average annual earnings.

"(b) In case the injured employee was not permanently totally disabled, such sum which, when added to the disability indemnity paid and due at the time of his death, shall equal four times his average annual earnings.

"(4) If death occurs to an injured employee other than as a proximate result of the accident, before disability indemnity ceases, death benefit shall be as follows:

"(a) Where the accident proximately causes permanent total disability, it shall be the same as if the accident had caused death.

"(b) Where the accident proximately causes permanent partial disability, liability shall exist for such benefit as shall fairly represent the proportionate extent of the impairment of earning capacity in the employment in which the deceased was working at the time of the accident or other suitable employment, caused by such disability.

. . . . . .

"(5) In cases included by the following schedule, the compensation to be paid, subject to the provisions of this act for

maximum and minimum payments, shall be sixty-five per cent. of the average weekly earnings of the employee for the periods named in the schedule, to wit:

"The loss of one arm at or near the shoulder, two hundred forty weeks;

"The loss of an arm at the elbow, two hundred weeks;

"The loss of a forearm at the lower half thereof, one hundred sixty weeks;

"The loss of a hand, one hundred sixty weeks;

"The loss of a palm where the thumb remains, eighty weeks;

"The loss of a thumb and the metacarpal bone thereof, sixty weeks;

"The loss of a thumb at the proximal joint, forty weeks;

"The loss of a thumb at the second or distal joint, twenty weeks;

. . . . . .

"The loss of a leg at the hip joint, or so near thereto as to preclude the use of an artificial limb, two hundred forty weeks;

"The loss of a leg at or above the knee, where stump remains sufficient to permit the use of an artificial limb, one hundred sixty weeks;

"The loss of a foot at the ankle, one hundred twenty weeks;

"The loss of a great toe with the metatarsal bone thereof, thirty weeks;

. . . . . .

"Total blindness of one eye, one hundred twenty weeks;

"Total blindness of the second eye, two hundred forty weeks;

"Total deafness of both ears, one hundred sixty weeks;

"Total deafness of one ear, forty weeks;

"Total deafness of the second ear, one hundred twenty weeks.

"When by reason of infection or other cause not due to the neglect or misconduct of the injured employee, he is actually disabled longer than the time specified in the foregoing schedule from earning a wage, compensation shall be paid such employee for such loss of wage within the limit otherwise provided.

"For the purposes of this schedule permanent and complete paralysis of any member shall be deemed equivalent to the loss thereof.

"Whenever an amputation is made between any two joints mentioned in this schedule (except amputations between the knee and hip joint) the resultant loss shall be estimated as if the amputation had been made at the joint nearest thereto.

"In all other cases in this class the compensation shall bear such relation to the amount stated in the above schedule as the disabilities bear to those produced by the injuries named in the schedule."

The contention of counsel for plaintiff is that in cases where the schedule of fixed compensation is applicable it provides the entire compensation payable and replaces the compensation that would otherwise be payable as disability indemnity, and that the instant case is governed by the schedule.

It seems to have been conceded by counsel on both sides that the applicant's injury was a relative injury under the schedule contained in sub. (5) of sec. 2394—9, therefore the schedule governed, but it appears that the *Commission* was in doubt upon the subject. In its opinion the *Commission* said:

"It may be a fairly close question as to whether or not applicant's injury can be said to be a relative injury under the schedule in the Compensation Act, but it seems to be conceded by both parties that it is, and on the whole the compensation will be fairly measured by applying the schedule in this case."

The theory of the statute seems to be to make provision in the schedule, sub. (5), for certain specific injuries and to leave all other injuries to be compensated for under other general provisions of the act.

It is the opinion of the court, therefore, that the injury to *Leipus* does not fall within the schedule of fixed compensation designated in the statute under which it was classed by the *Commission,* namely, "the loss of an arm at the elbow."

Obviously the "loss" of a member designated in the schedule has reference, not to the impairment of the member by the injury, but to the physical loss of it. All through the

schedule there is nothing to indicate that impairment of a member was intended to be loss of a member or that reduction of the efficiency of the member one half would be a one-half loss of the member. "The loss of an arm at the elbow," or "The loss of a forearm at the lower half thereof," does not mean the impairment of the arm, but the actual physical severance of it. The fact that the schedule so specifically fixes the precise injury for which compensation is allowed, excludes the idea that the schedule covers any other or different injury. In every instance the loss is specifically defined.

The whole schedule is so specific that it is difficult to see how the legislature could have intended that an injury to an arm impairing its usefulness fifty per cent., or any degree, would come within the schedule. It seems from the whole act that the purpose of the legislature was to confine the fixed compensation named in the schedule in sub. (5) to the specific injuries named therein.

Nor can we see that the injury here falls within the provision of sub. (5), sec. 2394—9, viz.: "In all other cases in this class," etc., because the injury here does not fall within the schedule class. "All other cases in this class" obviously has reference to the injuries mentioned specifically in the schedule and was not intended to include impairment occasioned by a different injury than that named in the schedule.

The court is therefore of opinion that the *Commission* and the court below were in error in holding that the present injury fell within the schedule of fixed compensation contained in sub. (5), sec. 2394—9, Stats., and that compensation should have been awarded *Leipus* under the other provisions of the statute, not under the schedule contained in said sub. (5).

By the Court.—The judgment of the court below is reversed, and the cause remanded for further proceedings according to law.

The appellant moved for a rehearing.

In support of the motion there was a brief by *Olin, Butler, Stebbins, Curkeet & Stroud,* attorneys for the appellant, and a brief on behalf of certain Wisconsin employers by *Vroman Mason* and *Thomas C. Angerstein* as *amici curiæ.*

In opposition to the motion there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, attorneys for the respondent *Industrial Commission,* and a brief by *Dietrich & Dietrich,* attorneys for the respondent *Leipus.*

The motion was denied, without costs, on November 16, 1915.

STATE, Plaintiff in error, vs. CLEVELAND and others, Defendants in error.

May 7—November 16, 1915.

Public officers: Malfeasance: Supervisor transporting members to town board meetings: Allowance of bill for traveling expenses.

1. The furnishing, by a member of a town board, of a conveyance to transport the members to and from their board meetings is not the purchase or sale of property or things in action nor a contract, proposal, or bid in relation thereto, within the meaning of sec. 4549, Stats., but is in the nature of labor or services.
2. The compensation of town supervisors being expressly provided for in sec. 850, Stats., and no provision being made for traveling expenses, they must themselves defray such expenses, and the allowance by the town board of bills for such expenses violates that clause in sec. 4549 which makes it an offense for any town officer to do "any other act in his official capacity or in any public or official service not authorized or required by law."

ERROR to review a judgment of the circuit court for Jackson county: JAMES O'NEILL, Circuit Judge. *Reversed.*

For the plaintiff in error there was a brief by the *Attorney General, J. E. Messerschmidt,* assistant attorney general, and *L. Olson Ellis,* district attorney, and oral argument by *Mr. Messerschmidt.*

For the defendants in error there was a brief by *G. M. & H. M. Perry,* and oral argument by *H. M. Perry.*

The following opinion was filed June 1, 1915:

WINSLOW, C. J. The three defendants constitute the board of supervisors of the town of City Point, Jackson county. An information charging them with malfeasance in office was quashed by the trial court and the state prosecutes a writ of error to reverse the ruling. The question presented is whether it is a criminal offense under sec. 4549, Stats. 1913, for one of the members of such a board to furnish a team and conveyance for the purpose of conveying the members of the board to and from their town board meetings, or to present a bill for the same to the board, or for the board to allow and pay the bill.

Upon the authority of *Menasha W. W. Co. v. Winter,* 159 Wis. 437, 150 N. W. 526, this question must be answered in the negative. In that case it was held that the section prohibited a public officer from having an interest in the purchase or sale of property or things in action or in any contract, proposal, or bid in relation to the same, and that the performing of services for the town would not be construed as coming within its meaning.

As said in that case, the statute is highly penal. The furnishing of a conveyance to attend a board meeting or to enable the board to transact necessary official duties is clearly not the purchase or sale of property or things in action, nor is it a contract, proposal, or bid in relation thereto. It is rather in the nature of labor or services. *Hogan v. Cushing,* 49 Wis. 169, 5 N. W. 490.

By the Court.—Judgment affirmed.

The following opinion was filed November 16, 1915:

WINSLOW, C. J. Upon the motion for rehearing our attention is called to the fact that upon the former hearing we

did not fully appreciate the contention of the *State*. That contention was, not merely that the auditing of a bill for livery hire in favor of one of the members of the town board was forbidden by sec. 4549, Stats., under the provision prohibiting town officers from being interested in contracts with the town, but that the town supervisors are not entitled to any allowance for traveling expenses, hence that their action in allowing a bill for such expenses violates the general clause of sec. 4549 which makes it an offense for any town officer to do "any other act in his official capacity or in any public or official service not authorized or required by law."

Upon mature consideration it seems that the point is well taken.

A public official's right to compensation is purely statutory; what the statute gives he receives, but no more. Mechem, Pub. Off. §§ 855, 856. Expenses are not allowed to town supervisors by any statute. Moreover, sec. 850 of the Wisconsin Statutes expressly fixes their compensation at the sum named by the annual town meeting, or in default of action by the town meeting at the sum of $3 per day. No provision is made for traveling expenses, and this means that, like other officials in that situation, they must defray their own expenses of this nature.

When, therefore, they allowed the bills in question they performed an act in their official capacity not only unauthorized by law but forbidden by law. The statute gives the widest possible latitude as to the punishment. A merely nominal fine may be imposed in the discretion of the trial court. Thus, that court may make due allowance for cases where it appears that there has been honest mistake and no criminal intent.

By the Court.—Judgment reversed without costs, and action remanded for further proceedings according to law.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Appellant, vs. RAILROAD COMMISSION OF WISCONSIN, Respondent.

November 16, 1915.

Railroad commission: Regulation of passenger service: Stopping trains at small stations: Interstate commerce.

Chicago, B. & Q. R. Co. v. Railroad Comm. 152 Wis. 654, reversed.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

BY THE COURT. The judgment of the court in this action, rendered March 11, 1913 [152 Wis. 654], affirming the judgment of the circuit court for Dane county, having been reversed by the supreme court of the United States upon writ of error [see 237 U. S. 220], and the mandate of said last named court having been received and filed:

Now, therefore, it is ordered and adjudged, pursuant to the command of said mandate, that the judgment of affirmance aforesaid rendered by this court be and the same is in all things vacated and set aside and that the judgment of the said circuit court for Dane county be and the same is hereby in all things reversed without costs, and that this cause be and the same is hereby remanded to the said circuit court with directions to enter judgment therein adjudging that the order of the said *Railroad Commission* involved in this action was and is void, and setting aside and vacating the same.

ZAVITOVSKY, Administrator, Appellant, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondent.

October 5—November 16, 1915.

Railroads: Action for death of employee: What law governs: Interstate commerce: Burden of proof: Evidence: Sufficiency.

1. Where the complaint in an action for death caused by negligence predicated liability under the state statutes, but defendant affirmatively claimed that the case fell under the federal Employers' Liability Act, defendant had the burden of proof on that proposition.
2. Coal which was piled on a dock and had passed out of interstate commerce was loaded upon cars and thence dumped into hoppers which projected into a sunken room or basement. From the hoppers it was taken by conveyors to a bin, was weighed out from such bin, and then went into another bin, from which it was spouted into the tenders of locomotives employed in interstate commerce. Railway employees were required every night to clean up, with shovels, the scattered coal from the floor of said sunken room and throw it into the conveyor, which carried it to the bins. While so doing one of them was fatally injured. The purpose of their work was primarily to clean the floor and the fact that the coal cleaned up finally reached the interstate locomotives was merely incidental. There were one or two men or crews of men between the deceased and the locomotives, as well as between the deceased and the coal pile on the dock. *Held*, that these facts did not show that the deceased when injured was engaged in interstate commerce.
3. Plaintiff's evidence in this case as to the description of the place of work, its surroundings and lighting, and also as to the manner in which deceased came to his death, is criticised as defective.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

William L. Tibbs and *George A. Bowman,* for the appellant.

For the respondent there was a brief by *C. H. Van Alstine* and *H. J. Killilea,* and oral argument by *Mr. Killilea.*

TIMLIN, J. In this case against a railroad employer for negligently, on January 2, 1913, causing the death of one of its employees not engaged in shop or office work, the learned circuit court directed a verdict for defendant. This was done apparently upon the ground that the evidence brought the case within the federal Employers' Liability Act, and at the same time conclusively showed assumption of risk by the deceased under that act. On the date above mentioned actions against employers for such injuries might fall under the Compensation Act (sec. 2394—1 *et seq.* Stats. 1911) in the cases therein mentioned, wherein there had been consent to come under the terms of that act, or might fall under general statutory regulations of the relation of master and servant as in the case of an employer having less than four employees, or an employer who neglected or refused to consent as in the Compensation Act provided, or in the case of railroad employers the case might come under the federal Employers' Liability Act, or under sec. 1816, Stats. 1911, or under the Compensation Act. It is only with the railroad class we have to do in the instant case. This inquiry is still further narrowed because the deceased employee was not engaged in shop or office work. The defendant was engaged in interstate commerce, and the first question which presents itself is whether the deceased employee was at the time of his injury also engaged in the same interstate commerce. The complaint manifestly predicated liability under the statutes of this state and the defendant in its answer affirmatively claimed that the case fell under the federal Employers' Liability Act. It therefore had on this proposition the burden of proof which usually falls upon the affirmative. As a result of professional strategy or inadvertence, it makes no difference which, the case has been very imperfectly presented by the evidence of both sides. We first inquire whether defendant has lifted the burden of proof resting upon it to show that the deceased was at the time of his injury engaged in

interstate commerce. We are informed by the evidence that he worked on the night shift, but what his duties were we do not know except that for about twenty minutes every night after 12 o'clock he, with four or five others, was required to clean up, with shovels, the scattered coal from the floor of a sunken or basement room, and in doing so to throw such coal into the conveyor, which carried it up into one or more elevated bins. This coal had been scattered on the floor in the process of taking it by conveyors from several hoppers which projected into said sunken room. The coal came to the hoppers from cars which were "dumped" into the hoppers. It got into these cars by being loaded thereon from a pile belonging to defendant lying on or near a dock not far from the hoppers. How the coal got on these cars we are not informed except what is suggested by the single word "dumped" applied to the unloading of the cars. Whether the deceased was engaged in loading or unloading this coal, or whether there was one or two men or crews of men between the conveyor and the coal pile, we do not know. It is much the same with the evidence tracing the coal cleanings from the floor to the tenders of locomotive engines which by stipulation were engaged in interstate commerce. The coal was not fed from the bin where the conveyor left it into these locomotive tenders. The evidence indicates that it had to be weighed out from this bin, and also indicates that it then went into another bin from which it was spouted into the tenders, so there must have been one or two men or crews of men between the deceased and the supplied locomotive as well as between the deceased and the coal pile on the dock. The deceased may have taken part in the last delivery into the tenders of the interstate locomotives, but that is not shown. It is shown that the coal in the pile on or near the dock had passed out of interstate commerce, and the one ground upon which it could be claimed that the deceased, at the time of his injury, was engaged in interstate commerce is that he was engaged in the performance of one

step in the transmission of this coal from that pile to the interstate locomotive for use in the latter as fuel. In cleaning up the floor deceased was not engaged directly in interstate commerce. His purpose and that of his employer was to clean up the floor, and there was no place to put the coal cleaned up except on the going conveyors, and the fact that it, with other coal and by the aid of other agencies intervening between deceased and the delivery to the interstate locomotive, finally reached the latter, was merely incidental. If deceased was at the time engaged in interstate commerce by reason of the foregoing facts, then so were the men between him and the coal pile loading and unloading cars, and for a stronger reason so were the men between him and the interstate locomotive weighing out the coal from the bin and delivering it directly into the tender. Only three illustrative cases need be noticed. *Pedersen v. D., L. & W. R. Co.* 229 U. S. 146, 33 Sup. Ct. 648; *Ill. Cent. R. Co. v. Behrens,* 233 U. S. 473, 34 Sup. Ct. 646; *Ruck v. C., M. & St. P. R. Co.* 153 Wis. 158, 140 N. W. 1074.

In the case first above cited the connection between the work in which the injured party was engaged at the time of his injury and interstate commerce was direct and immediate. The track, including the bridges, of a railroad used for interstate commerce trains, is always in use for that purpose, no matter what other purposes it may contemporaneously subserve. One engaged in the repairs of such track or bridge is engaged in a work which closely and immediately, without any intervening agency, furnishes an indispensable and direct aid in interstate commerce. In the second case above cited the injured man was a member of a switching crew at work in the yards. Within broad lines, as every court knows, the duties of such crew include assembling cars for the purpose of making up outgoing trains or parts of trains, and distributing some or all of the cars of the incoming trains. The interstate cars could not be assembled or distributed unless

local or intrastate cars of the same train which stand in the way were moved or disposed of. Interstate commerce could not be carried on where interstate and intrastate cars are mixed in the same train, as they nearly always are in freight trains, without moving the intrastate cars. Such movement is an operation essential to the carrying on of interstate commerce as long as switching is done as it is at present. The primary purpose of moving the intrastate cars is to deliver them to their destination, and the aid to interstate commerce secondary and incidental. Accordingly it was held that such member of a switching crew, injured while moving in the yard a car loaded with intrastate freight, was not within the act of Congress, although unquestionably the work he was doing was in aid of and essential to the carrying on of interstate commerce by transportation. In the instant case it appears from the evidence that the primary purpose of employer and employee was to clean up the floor, and the benefit to or aid to interstate commerce resulting therefrom was secondary and incidental. Had it been shown that deceased aided in delivering the coal upon the tender of the interstate locomotive and, as a step in assisting himself and his associates to perform that operation, cleaned up the floor of this room for twenty minutes every night, a different case might have been presented. Another phase of remoteness is considered in the case third above cited. But weighing these precedents as best we can, we are of the opinion that in the instant case the defendant has not lifted the burden of proof which rested upon it in this respect. It may be able to do so upon another trial.

We express no opinion upon the question of assumption of risk if the case should be finally found to come under the act of Congress, because the evidence may be quite different upon another trial and that question does not arise until after the case has been brought within the act of Congress. Neither do we express any opinion upon the merits of the case. The

plaintiff's evidence is very defective both with reference to the description of the place of work, the machinery, the platform, and the lighting apparatus, and also with reference to the manner in which the deceased came to his death. In this sunken or basement room, fifty feet long north and south by thirteen feet nine inches wide east and west, it appears that there are two conveyors consisting of receptacles called buckets mounted on a double sprocket chain, one running from north to south and from seven and one-half to fifteen inches west of the east wall, and one running in the opposite direction and about the same distance east of the west wall and three feet two inches apart. Each runs very slowly and at an elevation of about one foot from the floor of the room and horizontal to the floor until it passes round a sprocket wheel and changes its horizontal motion to a vertical motion in its journey to the elevated bins. In this sunken room there is a platform three and one-half feet above the floor in the south end of the room and eight by ten feet in surface area, but whether the east conveyor passed under any part or beam of this platform is very obscure, and we have no evidence concerning the number or location of the hoppers. There is evidence that this platform extends from the west wall to the west line of the east conveyor, and there is contradictory evidence with reference to whether the surface extension of ten feet is from east to west or from north to south. If the jury are to pronounce that this place is not as safe as the nature of the work would permit, they must be informed of its description with substantial accuracy by the plaintiff. The case is also very hazy on the question whether the death was caused by negligence of the employer or was the result of an unaccountable accident. With reference to the statutory rules of liability within which the facts must bring the case, the attention of counsel is invited to *Minneapolis, St. P. & S. S. M. R. Co. v. Industrial Comm.* 153 Wis. 552, 141 N. W. 1119, where the injury occurred June 24, 1912, and the in-

jured party was not a shop or office employee; also to the case of *Salus v. G. N. R. Co.* 157 Wis. 546, 147 N. W. 1070, where the injury occurred March 29, 1913; also to *Cox v. C., M. & St. P. R. Co.* 159 Wis. 491, 149 N. W. 709, 151 N. W. 267, where the injury occurred September 26, 1911. It is hoped that if the case ever makes another appearance in this court it will be more thoroughly presented on the facts and the dark places in the law above suggested illuminated by such learned briefs that *post argumentum* communications to this court will be unnecessary.

By the Court.—Judgment reversed, and the cause remanded for a new trial.

HANNAH and another, Respondents, vs. KNUTH and others, Appellants.

October 26—November 16, 1915.

Contracts: Agency: Subscription of money to operate mines: Selection of agents: When subscribers bound: Incurring debts: Joint liability of subscribers: Evidence: Minutes of meetings: Competency: Appeal: Harmless errors.

1. Where stockholders, including the president and directors, in a mining corporation signed an agreement whereby they severally subscribed certain sums "to a fund to be used in buying such articles as are necessary to operate the mill" of said company, "and to pay such bills as are pressing by having them assigned to our representative, the balance to be used to operate the mines and mill . . . , providing the directors pledge to us the gross output of the operations or enough of the product to repay us the money subscribed and guarantee to us that none of the money received by the operation of the mill shall be used for any other purpose than running said mill until we have been repaid," etc., each subscriber, whether he signed before or after the acceptance of the proposition by the directors of the company, conferred upon his associates, by clear implication, the power to create the agency necessary to carry out the purposes

of the agreement, and was bound by their action even though he himself neglected or refused to take part in the selection of such agents.

2. Where such proposition was presented by one or more of the subscribers at a meeting of the directors and was accepted by them, all subscribers were bound by such acceptance; and the minutes of such meeting were competent evidence as being part of the *res gestæ*.

3. So, also, the minutes of a subsequent meeting of the subscribers reciting that thirty-three of them were present, some of whom were identified by name, that the minutes of the directors' meeting were read to them, and that they elected an advisory board of subscribers to act with the directors and also a trustee for the subscribers, were competent evidence as being in the nature of admissions.

4. The representatives of the subscribers, acting with the directors, having operated the mines and mill pursuant to the agreement and having incurred certain debts for work and materials in the attempt, through such operation, to repay to the subscribers the amounts advanced by them, all of the subscribers became jointly liable for the debts so incurred.

5. The testimony of the manager employed to take charge of the mines and mill under the agreement was sufficient to prove the claims for work and materials, and it was not necessary to prove each such claim by the testimony of the person who did the work or furnished the material.

6. Where a cause is tried by the court without a jury, the admission of incompetent evidence is not available as error on appeal unless some proposition essential to sustain the judgment has no evidence to support it other than such incompetent evidence.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

For the appellants there was a brief by *Kronshage, McGovern & Hannan,* and oral argument by *Timothy J. Hannan.*

For the respondents there was a brief by *Flanders, Bottum, Fawsett & Bottum,* and oral argument by *Charles E. Monroe.*

TIMLIN, J. To maintain the issues arising upon a complaint charging that the defendants were a voluntary association and copartners, at the times mentioned, engaged in operating a mine in Montana, and that a large number of persons

named during such time performed services or sold and delivered material to the defendants, and that all these claims, aggregating about $4,000, were assigned to the plaintiffs; and an answer amounting to a general denial; the plaintiffs introduced in evidence a writing signed by each of the defendants with a sum set opposite his or her name, and this writing was as follows:

"Milwaukee, Wis., May, 1908.

"We, whose signatures appear below, hereby subscribe the amount set opposite our names to a fund to be used in buying such articles as are necessary to operate the mill of the Milwaukee Gold Extraction Co., and to pay such bills as are pressing by having them assigned to our representative, the balance to be used to operate the mines and mill of said company, providing the directors pledge to us the gross output of the operations or enough of the product to repay us the money subscribed and guarantee to us that none of the money received by the operation of the mill shall be used for any other purpose than running said mill until we have been repaid.

"It is understood that the property bought with this money shall remain our property until we have been fully repaid, and that in case that after making the repairs of the mill should anything prohibit us from operating the mill that we shall stand as creditors of said company.

"Subscription: $100.00, *H. Knuth,* 1114 Chambers St., paid 6/16/08," etc., etc.

This written contract was supplemented by written evidence consisting of (1) the corporate records of a meeting of the directors of the Milwaukee Gold Extraction Company held June 15, 1908, showing that the writing first mentioned was produced at that meeting by *Mr. Dwight,* the president of the corporation and one of the signers of the first mentioned writing, and that thereupon resolutions were adopted in effect accepting that proposition, permitting such an association to operate the mill until such time as the output thereof has repaid to them the money advanced by them and six per cent. interest, not, however, to exceed four months from and after July 1, 1908, and providing that the board of di-

rectors advise with, consult, and co-operate with the subscribers to said writing in all things pertaining to the operation of the mill, the purchase of material, and the payment of pressing bills against the company. It is contended by appellants that the record of the meeting of the corporation directors was incompetent as against the subscribers to the writing first mentioned. (2) Minutes of a meeting of the subscribers held on the evening of June 15, 1908, reciting that thirty-three subscribers were present and organized and that there was read to them the minutes of the directors' meeting mentioned and that three of the subscribers were by this meeting elected to act with the board of directors of the corporation as an advisory board and that *Mr. Dwight* was elected trustee for the subscribers. It is contended that this writing was not competent evidence.

Other evidence was introduced which showed (1) that all the subscribers were stockholders of the Milwaukee Gold Extraction Company and *O. F. Dwight,* one of the subscribers, was its president and a director, and that all of the seven directors of the Extraction Company were subscribers; (2) that on the afternoon of June 16, 1908, four of the seven directors of the Extraction Company and one of the advisory board of the subscribers held a meeting and employed one E. Hiland Pitcher to take charge of the mine and mill in Montana, fixing his salary. *Mr. Dwight* was present at this meeting and Mr. E. Hiland Pitcher went to Montana, took charge of the property, and under his administration the liabilities alleged were incurred. Considerable gold was realized by this operation, but it was used up in paying expenses, leaving the claims sued on unpaid. Appellants contend that there is no evidence identifying the thirty-three subscribers present at the subscribers' meeting of June 15th, and no subsequent meeting of the subscribers, hence the latter were not bound by these doings of *Dwight,* Pitcher, and the directors, and the so-called advisory board, because these men were not ap-

pointed by all the subscribers, and while their action might be binding upon the subscribers who procured and secured their appointment it could not affect subscribers who were not shown to have been present at such meeting and who are not shown to have taken any part in appointing E. Hiland Pitcher, or any one else, to take charge of the property and operate it, or in appointing the advisory board, or in appointing *Dwight* as trustee. It is contended by appellants that the subscription agreement above referred to and presented at the directors' meeting of the Extraction Company was not at that time signed, but we think the evidence tends more strongly to show that before that it was signed by most of the defendants. It is further contended that this paper was not at that time signed by all the defendants, and we think this is correct. There seem to be forty-six signers, and Schissler, Buschman, and *Dwight* are the thirty-third, thirty-fourth, and thirty-fifth names. There seems to be evidence by inference that the eleven names following were added after the meeting of June 15th. It is quite certain that *Dwight* and the other directors of the Gold Extraction Company had signed the paper before it was presented to the directors' meeting of June 15th. All points made by the appellants rest upon the basic proposition that the evidence does not tend to show anything more than a subscription of money by a certain group of stockholders for the purpose of paying present and pressing obligations of the corporation mentioned and operating the plant only so far as the money thus subscribed would carry on such operation.

This case, however, largely turns upon the construction of the written instrument above quoted. A proper construction of that instrument solves all the questions in this case relating to the competency of evidence and to the right of recovery. Whoever signed that instrument before the directors' meeting of June 15th and permitted one or more of his associates to present that paper bearing his signature to the di-

rectors' meeting for acceptance is certainly bound by such acceptance, and whoever signed it after that meeting, signed it with the knowledge that he promised a sum of money "to be used in buying such articles as are a necessity to operate the mill." To be used by whom? Each signer knew that there was to be an agency for the disbursement of the fund. He knew that the bills were to be paid by some one acting as agent for the subscribers and that the paid bills were to be assigned to the representative of the subscribers. "The balance to be used to operate the mines and mill of the said company." To be used by whom? Manifestly not by all acting in mass, but by some representative person or persons. It was next provided that the directors pledge to the subscribers the gross output of the operation or enough of the product to repay them the money subscribed and that the directors should guarantee to them that none of the money received by the operation of the mill, that is to say, none of the proceeds of the operation, should be used for any other purpose than for running said mill until the subscribers had been fully paid. This informed every signer that the directors of the company, all of whom were also signers, would continue to have a voice in the operation of the mill and in the receipt of the proceeds of such operation. Without continuing this analysis it is apparent that every man who signed this subscription agreement did so with the understanding that he was to be represented by some person or persons in buying articles of necessity, in paying present bills of the corporation, in holding such bills as trustee for him and his cosigners, *and in operating the mines and securing the proceeds of such operation for the benefit of such subscribers.* After signing such an instrument he could not disable the other signers from proceeding with the enterprise by merely neglecting or refusing to take any part in the selection, appointment, or authorization of such agents. In this respect he would be bound by the action of his associates who did take such part, because by this writ-

ing, by clear implication and by the necessity of the situation he conferred upon his associate subscribers the power to create the agency necessary to carry out the purposes of the subscription contract. For this reason the minutes of the directors' meeting of June 15th accepting the proposition were competent as *res gestæ*. For this reason the minutes of the meeting of the subscribers on June 15th were in the nature of admissions and competent, because it was affirmatively shown that thirty-three of the subscribers were present at that meeting and some of those present were identified by name.

This cause having been tried by the court without a jury, the admission of incompetent evidence cannot be assigned as error on appeal unless some proposition essential to sustain the judgment has no evidence to support it other than such incompetent evidence. We find no such situation here. There seems to be ample evidence, oral as well as written, to support the finding that pursuant to the subscription agreement quoted parties representing the subscribers, acting with the directors of the Gold Extraction Company, operated the mines and mill of the latter company for the purpose of attempting to repay to the subscribers the amount advanced by each. They were unable to make such payment, but in the attempt they incurred the liabilities for which judgment has been rendered against them in the court below. These liabilities were therefore incurred by agents of all the subscribers acting under the authority of all, although appointed by less than all, because the subscribers entered into a contract which could only be carried out by and through agents appointed for that purpose, thus conferring upon their associates authority to appoint such agents in case they failed or neglected to make the appointment or to take part in the appointment themselves. No other construction would give force and effect to the subscription contract. Whether the representatives of the subscribers were acting under a lease or a license or a mere informal agreement with the directors is imma-

terial. It was not necessary to prove each of the assigned claims by the testimony of the person who did the work or furnished the material, although such testimony was competent so far as it went. The testimony of Pitcher, the manager who incurred these obligations, was sufficient. The trial court properly ordered judgment to be enforced against the joint property of all the defendants and the separate property of each except the separate property of the defendant E. Hiland Pitcher, because the latter was not served with process and did not appear in the action. We believe other findings of fact are well supported by competent evidence, and the judgment should be affirmed.

By the Court.—Judgment affirmed.

SPENCER and wife, Appellants, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondent.

October 26—November 16, 1915.

Railroads: Injury to person riding in engine cab: Trespasser or licensee? Presumptions.

1. One who enters the cab of a railway engine for the purpose of getting a free ride in violation of Wis. Stats., secs. 1797—1 to 1797—38, and 36 U. S. Stats. at Large, 546, ch. 309, becomes thereby a trespasser, although the engineer makes no objection; and for his death caused by explosion of the boiler while he is so riding there can be no recovery, in the absence of wilful or gross negligence on the part of the engineer.
2. In view of the law prohibiting such free passage, and it being common knowledge that the engine cab is for the exclusive use of the engine crew, a person attempting to ride free therein is presumed to know that the engineer has no authority to permit him to do so, and to wilfully commit an unlawful act.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

Action to recover for the death of plaintiff's son, who was an adult.

While one of defendant's freight trains, which was about to start for Chicago, was standing on a sidetrack at Milwaukee, Wisconsin, the deceased, without the knowledge of the trainmen and without right, boarded such train for the purpose of obtaining a free ride to its destination. After the train had proceeded on its way some eighteen miles, a stop was made and then the deceased entered the cab of the engine without invitation. The engineer knew him and did not object to his riding in the cab. When the train had proceeded about two miles further, the crown sheet of the firebox burst, causing steam to escape into the cab, whereby the death was caused. The bursting of the crown sheet was caused by there not being a sufficient amount of water in the boiler. It was the duty of the engineer to regulate the water so as to prevent any such an occurrence as took place. There was a water glass appliance which ordinarily indicated the height of the water in the boiler, though it was possible for it to become clogged in some way, or operate so as not to be perfectly reliable. There were three gauge cocks by which the height of the water could be certainly determined. If, upon opening the lower cock, no water was discharged, it would indicate that the crown sheet was not sufficiently covered. The engineer customarily tested the water by use of the gauge cocks once in about ten miles. He applied the proper test before starting, again before leaving the city limits at Milwaukee, and a third time about eight miles out. After going some twelve or thirteen miles further, he tried the water again and found that the crown sheet was not properly covered. He immediately observed the water glass and saw that water showed up therein, at which instant the explosion occurred.

By the statutes of this state, secs. 1797—1 to 1797—38, the deceased had no right to ride free and the defendant had no right to permit him to do so. Under the law of the United

States, act of June 18, 1910 (36 U. S. Stats. at Large, 546, ch. 309), it was unlawful for the deceased to ride free, and unlawful for defendant to permit him to so ride. A violation of the federal act by the defendant, or by any one permitted by it to ride free, would be a punishable offense.

Under defendant's rules, the engineer was prohibited from permitting the deceased to ride on the engine. Whether he knew of such rule or not does not appear.

The court submitted the cause to the jury, resulting in findings as follows:

The engineer did not commit any act proximately causing the death of the deceased. The deceased was not guilty of any want of ordinary care proximately contributing to his death. It requires $2,500 to compensate plaintiffs for the loss they sustained by the death of their son.

The court denied a motion on behalf of plaintiffs for judgment and denied them a new trial, but granted judgment on the verdict in favor of the defendant and because the deceased was a trespasser.

For the appellants there was a brief by *Rubin, Fawcett & Dutcher,* attorneys, and *W. B. Rubin* and *Paul R. Newcomb,* of counsel, and oral argument by *Mr. Newcomb* and *Mr. W. B. Rubin.*

For the respondent there was a brief by *C. H. Van Alstine, H. J. Killilea,* and *Rodger M. Trump,* and oral argument by *Mr. Trump* and *Mr. Van Alstine.*

MARSHALL, J. It is conceded by counsel for appellants that if the deceased was a trespasser on respondent's train, as the trial court held, the plaintiffs could not recover in the absence of wilful negligence—some fault greater than mere want of ordinary care on the part of the engineer—and that no evidence of any greater fault was produced. That accords with elementary principles which have been many times declared and applied by this court, one of the latest instances

being *Zartner v. George,* 156 Wis. 131, 145 N. W. 971. It follows that if the deceased was not a licensee, the judgment must be affirmed.

As we view the case, none of the authorities cited by counsel for appellants fit the circumstances we have to deal with. Let it be conceded, for the purposes of the case, that the mere fact, unknown to the deceased, that the engineer had no authority to permit him to ride on the engine, would not condemn him as a trespasser, he must have known there was no such authority, or had reasonable ground therefor.

The reasoning in *Clark v. C. & N. W. R. Co.* 91 C. C. A. 358, cited to our attention by counsel for respondent, seems to be sound. We adopt it. It is a matter of common knowledge that trainmen have no right to permit persons to ride free, particularly to ride on the engine.

"The authorities are in harmony in holding that in a place like an engine cab, drawing a train of cars, the person who voluntarily enters therein to ride is presumed to know that it is not designed for such use, and no presumption arises in favor of such persons that the engineer and conductor have either express or implied authority to grant him such permission." "While some courts have gone to considerable length in holding railroad companies responsible for the acts and assumptions of their employees while in positions of apparent authority, yet when requested to hold that there is any presumption in favor of the authority of the employee to permit third persons to use places and instrumentalities obviously not designed therefor by the master, they come to a halt."

In the present state of the law, absolutely making such conduct as the deceased was guilty of a punishable offense, it does not seem that there is any basis in the evidence in this case for holding that he was a licensee. He must be presumed to have known that in doing as he did, he was where he had no right to be and was there in violation of law. Under those circumstances, how can he be regarded as having been other than a trespasser?

It does not seem that *Gabbert v. Hackett,* 135 Wis. 86, 115 N. W. 345,—where the facts were that a policeman in good faith, according to custom, permission of the company, and an ordinance believed to be in force, took passage on a street car, has any bearing on this case; nor cases cited involving violations of the Sunday laws; nor such cases as *Ulicke v. C. & N. W. R. Co.* 152 Wis. 236, 139 N. W. 189, where walking upon a railway track was held not to preclude recovery by a person too young to appreciate his violation of law; nor such cases as *Davis v. C. & N. W. R. Co.* 58 Wis. 646, 17 N. W. 406, and *Mason v. C., St. P., M. & O. R. Co.* 89 Wis. 151, 61 N. W. 300, where walking upon a railroad track in violation of law, but by acquiescence of the railway company, was held not to involve a trespass; nor such as *Alexander v. M., St. P. & S. S. M. R. Co.* 156 Wis. 477, 146 N. W. 510, involving an inadvertent driving upon a railway track outside the highway. None of those cases are inconsistent with *Anderson v. C., St. P., M. & O. R. Co.* 87 Wis. 195, 58 N. W. 79, and *Schug v. C., M. & St. P. R. Co.* 102 Wis. 515, 78 N. W. 1090, holding that wilful walking upon a railway track in violation of law and not pursuant to a custom acquiesced in by the railway company, constitutes the person doing so a trespasser.

We note that, in *Alexander v. M., St. P. & S. S. M. R. Co., supra, Tunnison v. C., M. & St. P. R. Co.* 150 Wis. 496, 137 N. W. 781, is cited as holding that walking upon a railway track in violation of law is contributory negligence, only. What was there held is that such conduct is contributory negligence, the question of the status of the person, as to whether a licensee or not, being waived for the purpose of the case.

We limit the decision here to the precise situation involved. For a principle it may be stated thus: If a person enters the cab of a railway locomotive for the purpose of obtaining a free ride, and there is no objection made by the engineer—in view of the law prohibiting such free passage and the place being, by common knowledge, for the exclusive use of the en-

gine crew—such person is presumed to know that the engineer has neither actual nor apparent authority to permit him to do so, and to wilfully commit an unlawful act, and he thereby makes himself a trespasser.

By the Court.—Judgment is affirmed.

MEYER, Appellant, vs. MARGOLIS and another, Respondents.

October 26—November 16, 1915.

Arrest and bail: Action on bail bond: Jurisdiction of Milwaukee civil court: Extension of time for surrender of defendant: Terms: Discretion: Fraud.

1. Where an action on a bail bond given in circuit court was commenced in the civil court of Milwaukee county, the latter court obtained jurisdiction to entertain an application under sec. 2711, Stats. 1913, to extend the time for the surrender of the defendant to the sheriff in exoneration of his bail.
2. The imposition of terms is not necessary as a condition of granting such relief.
3. No fraudulent disposition or appropriation by the bail of the property of the defendant was shown in this case; nor does it appear that they wrongfully conspired with the defendant to keep him beyond the reach of the process of the court, or that they failed to use due diligence to have him return to the state and render himself amenable to such process.

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

This is an action on a bail bond given pursuant to an order for arrest in a civil action for damages for injury to the person.

On November 19, 1913, the plaintiff obtained a judgment against Charles F. Hoppenrath in the Milwaukee county circuit court for the sum of $783.71 as damages and costs in an action for personal injuries she sustained in a collision with plaintiff's vehicle and Hoppenrath's automobile. Hoppen-

rath was arrested on a civil warrant in that action and gave bail in the sum of $1,000, signed by the defendants *Max Margolis* and Hoppenrath's mother, *Louisa Heinzle,* to secure his release from arrest. The condition expressed in the undertaking is that the parties thereto "do hereby undertake in the sum of one thousand ($1,000) dollars that said defendant shall at all times render himself amenable to the process of the court during the pendency of this action, and to such as may be issued to enforce a judgment therein." An execution against the property of Hoppenrath to satisfy that judgment was returned unsatisfied December 22, 1913. On May 21, 1914, proceedings supplementary to this execution were instituted, resulting in the appointing of a receiver therein May 29, 1914. The examination of Hoppenrath failed to disclose that he was possessed of property subject to levy and seizure to satisfy the judgment. On December 30, 1914, the receiver reported that he was unable to find any property to apply in satisfaction of the judgment except the sum of $54.16, and his report was accepted by the court and an order entered discharging him. On January 12, 1915, an execution against the body of Hoppenrath issued and was delivered to the sheriff, who on January 20th following made return thereon that Hoppenrath was not to be found within his jurisdiction. It appears that Hoppenrath had theretofore enlisted in the United States army and that he was on active duty in the state of Arkansas when this execution against his body was issued and returned. On January 22, 1915, this plaintiff commenced this action against these defendants, as bail for Hoppenrath on the undertaking given under the circuit court order as above stated, in the civil court of Milwaukee county by the issuance of summons returnable February 2, 1915, which was served on defendants in this case. On the return day of this summons the parties appeared by their attorneys and adjourned the case to February 16, 1915, without service of any pleadings until February 10, 1915, when the complaint was served. Neither the plaintiff nor

her attorney had, prior to this day, notified defendants of the purpose of this action nor demanded of either defendants or their attorney that Hoppenrath be produced and render himself amenable to the process of the court pursuant to the undertaking given in the original circuit court action. Upon service of the complaint on defendants, informing them of the object of this action, they immediately took steps to have Hoppenrath return to the city of Milwaukee, and he appeared in court on the adjourned day (February 16th) of the action and offered to surrender to the sheriff. This was five days after the expiration of the twenty days from the day of the service of the summons in the action. On this day the judge of the civil court wherein the action was pending entertained an application for an order to show cause why the time should not be extended to enable the defendants, as bail, to surrender Hoppenrath to the sheriff in exoneration of his bail. Upon the hearing of this order the civil court extended the time ten days from the 10th day of March within which defendants might surrender Hoppenrath, and upon such surrender this action against defendants to stand dismissed without costs to either party. It appears defendants did surrender Hoppenrath to the sheriff pursuant to such order, and the civil court on March 13, 1915, entered a judgment dismissing the action with costs.

Upon appeal by plaintiff from such judgment to the circuit court and a hearing upon the record, the circuit court entered judgment affirming the judgment of the civil court and awarded defendants recovery of costs and disbursements on the appeal, amounting to $16.20. From such judgment this appeal is taken.

F. H. Gugel, for the appellant.

Louis L. Cohen, for the respondents.

SIEBECKER, J. In this case it is held that since plaintiff elected to commence her action against defendants, on the undertaking signed by them, in the civil court of Milwaukee

county that court obtained jurisdiction to entertain an application under the provisions of sec. 2711, Stats. 1913, to extend the time for the surrender of Hoppenrath to the sheriff in exoneration of his bail given in the original action in the circuit court. The right to such relief conferred by the provisions of this statute does not require the imposition of terms as a condition of granting the relief. Hence plaintiff's claim that the court erred in not imposing terms on the defendants in extending the time for the surrender of Hoppenrath is not well founded. The provisions of secs. 2831 and 2832 are not applicable here and do not control.

We find no basis in the record for appellant's claim that the defendants had means to indemnify themselves out of Hoppenrath's property. The contention that the defendant *Heinzle* and Hoppenrath have through collusion fraudulently disposed of or concealed his property is not established by the facts and circumstances, nor does it appear that defendant *Heinzle* has wrongfully secured possession of any of Hoppenrath's property. The receiver in supplementary proceedings evidently found no such fraudulent disposition of Hoppenrath's property and hence took no steps to secure possession thereof. The civil court in granting the order for an extension manifestly arrived at the conclusion that defendant *Heinzle* was not guilty of such a fraudulent appropriation of the property, and his conclusion must stand.

We discover no substantial basis for the claim, upon the facts and circumstances shown by the record, that the defendants wrongfully conspired with Hoppenrath to keep him beyond the reach of the processes of the court during the twenty days after this action was commenced, nor does it appear that defendants failed to use due diligence to have Hoppenrath returned to the state and render himself amenable to the court's processes after they were informed of the purpose of this action. The circuit court properly affirmed the judgment of the civil court.

By the Court.—The judgment appealed from is affirmed.

GREENYA, Respondent, vs. RELIANCE SECURITY COMPANY, imp., Appellant.

October 27—November 16, 1915.

Pleading: Action "against a corporation:" Complaint: Sufficiency: Foreclosure of mortgage: Claimant of subsequent lien: Disclaimer.

1. Where, in an action to foreclose a mortgage, a security company was made a defendant on the sole ground that it had or claimed some interest or lien subsequent to the lien of the mortgage, the complaint was not demurrable merely because it failed to allege that the security company was a corporation. The action in such a case is not against the company within the meaning of sec. 3205, Stats., but notice of the foreclosure proceedings is merely given it because of its subsequent lien or claim.
2. If in such a case the security company has or claims no interest subsequent to the mortgage, it should disclaim and the suit should be dismissed as to it.

APPEAL from an order of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

W. C. Seefeld, for the appellant.

For the respondent the cause was submitted on the brief of *Julius O. Roehl.*

KERWIN, J. The defendant *Reliance Security Company* appealed from an order overruling its demurrer to the complaint on the ground that the complaint did not state facts sufficient to constitute a cause of action.

The action was brought to foreclose a mortgage executed by the defendants Theodore Schubring and Margaret Schubring, his wife, and the complaint alleges that said mortgagors conveyed said mortgaged property by warranty deed to the defendant Arthur Hoffmann subject to said mortgage, which said Hoffmann assumed and agreed to pay. The complaint further alleges that the defendant *Reliance Security Company* had or claims to have some interest in or lien upon the mortgaged premises, which interest or lien, if any, accrued

subsequent to the lien of the mortgage. The complaint does not state that the defendant *Reliance Security Company* is a corporation. A notice of the object of the action was served upon the defendant *Reliance Security Company.*

The claim of the appellant is that the complaint is demurrable because it fails to state that the defendant last named is a corporation. Sec. 3205, Stats., provides:

"In an action by or against a corporation the complaint must aver that the plaintiff or defendant, as the case may be, is a corporation. If it was incorporated under any law of this state that fact must be averred; if it was not so incorporated an averment that it is a foreign corporation is sufficient. The complaint need not set forth or specially refer to any act or proceeding by or under which the corporation was made."

We do not think the instant case falls within the terms of the statute. This is not an action against a corporation within the meaning of the statute. No claim is made against the defendant *Reliance Security Company.* This defendant is simply given notice of the proceedings to foreclose a mortgage upon premises upon which it has or claims to have a lien subsequent to the lien of the plaintiff. It is wholly immaterial whether the defendant *Reliance Security Company* is a corporation or not. The cause of action stated is against the other defendants and no cause of action is stated or attempted to be stated against the defendant *Reliance Security Company.* Notice is given to said *Reliance Security Company* of the foreclosure proceedings because of its subsequent lien or claim on the premises involved.

If the *Reliance Security Company,* defendant, has or claims no interest subsequent to the mortgage of the plaintiff, it should disclaim and the suit should be dismissed as to it. *Gilchrist v. Foxen,* 95 Wis. 428, 70 N. W. 585; *Strobe v. Downer,* 13 Wis. 10.

Carpenter v. McCord L. Co. 107 Wis. 611, 83 N. W. 764, is relied upon by appellant. We think the case is distinguish-

able from the instant case. In that case the action was brought against the McCord Lumber Company and the Soper Lumber Company under the log lien statute, sec. 3329, to enforce a lien against logs owned by the McCord Lumber Company when the lien accrued and afterwards sawed into lumber and sold to the Soper Lumber Company. There was a joint demurrer by both defendants. The action was within the meaning of the statute against the McCord Lumber Company and the Soper Lumber Company, corporations.

By the Court.—The order appealed from is affirmed.

WEHR, Appellant, vs. GIMBEL BROTHERS, INCORPORATED, Respondent, and another, imp., Appellant.

October 27—November 16, 1915.

Judgment: When rendered: Oral announcement.

1. **The announcement of judgment from the bench is the judgment in fact, and the written judgment generally is merely the evidence thereof; but it should be certain that the court intends to pronounce judgment and not merely to make a preliminary order which is expected to result later in a judgment.**
2. **An entry in the clerk's minutes stating that defendant's motion to dismiss the complaint was "granted as per findings to be filed," and entries at a later term showing continuances of "the matter as to a rehearing," together with unsigned and unfiled findings of fact found among the papers in the case, are *held* to show that judgment was not pronounced at the time of the first entry.**

APPEALS from orders of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Dismissed.*

For the appellants there was a brief by *Kronshage, McGovern & Hannan,* attorneys for *Henry Wehr,* and *Lines, Spooner, Ellis & Quarles,* attorneys for *Wehr Building Company,* and oral argument by *F. E. McGovern* and *George Lines.*

For the respondent there was a brief by *Glicksman, Gold & Corrigan,* attorneys, and *Thomas M. Kearney,* of counsel, and oral argument by *Nathan Glicksman.*

WINSLOW, C. J. The appeals here are by the plaintiff, *Wehr,* and the interpleaded defendant the *Wehr Building Company* from orders made on motion of the defendant *Gimbel Brothers* interpleading the *Wehr Building Company* and the city of Milwaukee as defendants in the equitable action originally brought by said *Wehr* against the *Gimbel Brothers,* and allowing the said *Gimbel Brothers* to serve a cross-complaint in equity against *Wehr* and the interpleaded defendants.

The first question arising in the case is whether the orders are appealable. The only ground upon which the appellants attempt to sustain their appealability is that they are final orders affecting a substantial right made upon summary application after judgment and hence are within sub. (2) of sec. 3069, Stats., governing appealable orders. It seems quite clear that there is no other provision of the section under which it can be claimed that the orders are appealable. The question is therefore whether judgment had previously been rendered in the action. It is admitted that no formal written judgment had been filed, but it is claimed that judgment had been pronounced from the bench and that under the decisions of this court ending with the case of *Wallis v. First Nat. Bank,* 155 Wis. 533, 145 N. W. 195, this was an effective final judgment closing the case.

The determination of this question rests chiefly upon the proper construction to be given to certain entries upon the minutes of the clerk of the court which appear in the record.

The action was originally brought by *Henry Wehr* in June, 1907, against his tenant, the *Gimbel Brothers* corporation, to prevent it from erecting a building upon the leased premises, and the question involved related to the location of the

east line of the demised premises upon the Milwaukee river, and was another phase of the controversy involved in the case of *Milwaukee v. Gimbel Bros.* 130 Wis. 31, 110 N. W. 7. It is not considered that it would be helpful here to state the details of the litigation. An answer was filed and the cause came on for trial May 21, 1909. The following entry appears upon the daily minutes of the clerk upon that day:

Henry Wehr vs. Gimbel Brothers.	May 21, 1909. Before Hon. L. W. HALSEY. This action being on the day calendar and reached in its regular order was called for trial. Van Alstine & Killilea appearing for plff., and Winkler, Flanders, Bottum & Fawsett appearing for deft., trial proceeded, witness sworn, testimony closed, deft. moves that plff's complaint be dismissed upon the merits with costs, motion granted as per findings to be filed.

No further entries appear in May or June, but in July the following entries appear in the order given, viz.:

Henry Wehr vs. Gimbel Brothers.	July 16, 1909. The court by request of H. J. Killilea, plaintiff's counsel, and upon the court's own motion, orders, that the matter as to a rehearing, be continued to July 21, 1909.
Henry Wehr vs. Gimbel Brothers.	July 21, 1909. Before Hon. L. W. HALSEY. The matter as to a rehearing continued to July 22, 1909.
Henry Wehr vs. Gimbel Brothers.	July 22, 1909. The matter as to a rehearing, continued to such time as may be set by the court, upon application. Court so orders.

All these entries appear in substantially the same form in the clerk's docket of the case.

Neither findings nor judgment were ever signed or filed, but an unsigned paper was found with the bundle of papers in the case, indorsed "Findings," in which, after the fact of the trial was recited, it was stated that "I find that the allegations of the complaint are not sustained by the evidence and that the plaintiff was not entitled to the injunction," followed by a conclusion of law to the effect that the complaint should be dismissed on the merits with costs and an order that judgment be entered.

This paper was dated May 21, 1909, bore the name of the law firm which had appeared for the defendant in the case, but was never filed, and had upon the outside, written in pencil, the word "Hold." No oral evidence was given on either side concerning the matters covered by the journal entries.

No further steps were taken in the cause until January 18, 1915, when the motions which resulted in the orders appealed from were made.

We fully recognize the principle that the announcement from the bench is the judgment in fact and that the written judgment generally is merely the evidence thereof. *Wallis v. First Nat. Bank,* 155 Wis. 533, 145 N. W. 195, and cases there cited. It should be quite certain, however, that the oral pronouncement is intended to be the judgment and not merely an announcement of the opinion of the court or an indication of what the judgment is to be; in other words, it should be certain that the court intends to pronounce judgment and not merely to make a preliminary order which is expected to result in a judgment at a later period. It is to be remembered that all parties expect a written judgment to be entered and that in equity cases the statute contemplates and requires that findings be signed and filed before judgment is entered.

Taking the clerk's minutes of the 21st of May, it seems to us fairly certain that they indicate, not that judgment was

then presently announced, but that the trial judge announced simply that the motion to dismiss was granted and that findings would be drawn later, after which judgment would be formally entered.

The unsigned findings rather tend to support this conclusion, as they seem to indicate that they were prepared and were unsatisfactory and hence never signed. The entries in July showing that a possible rehearing of the case was under consideration are also persuasive on the question. If judgment had already been entered there could be no efficient rehearing without setting aside the judgment, and nothing is said about such a motion. Moreover, the term at which the supposed judgment was rendered had expired and it could not be changed except under the provisions of sec. 2832, Stats., and no mention is made of any such motion.

Our conclusion is that the facts in evidence show that for some reason judgment was purposely delayed rather than that it was pronounced.

It follows that the appeals must be dismissed

By the Court.—Appeals dismissed.

GIMBEL BROTHERS, INCORPORATED, Appellant, vs. MILWAUKEE BOSTON STORE and others, Respondents.

October 27—November 16, 1915.

Injunction: When granted: Discretion: Mandatory injunction: Use of easement: Obstruction of alley: Rights of lessees: Substantial injury to plaintiff: Great damage to defendant.

1. The power to issue mandatory injunctions is sparingly used.
2. A lessee has a right to protect his leasehold interest against unlawful interference therewith, but in the matter of restraining the closing of an adjacent alley he does not stand in the same

position before the court as would the owner, even though he has an unexpired option to purchase the leased premises.

3. In cases involving the right to the use of easements substantial damage is necessary to support an injunction.

4. Courts generally exercise their discretion against issuing an injunction where it will produce great public or private mischief merely to protect technical, doubtful, or unsubstantial rights, the plaintiff in such a case being relegated to his remedy at law to recover damages.

5. A defendant will not ordinarily be compelled to pull down an expensive structure merely because some legal right may be invaded, if the injury complained of is slight and if his acts were performed in good faith and in the belief that he was acting within his legal rights.

6. Thus, where defendants, relying on the validity of proceedings by a city to vacate part of an alley, began the erection of a building which inclosed the vacated portion, and thereafter plaintiff, who was a lessee of abutting property, brought an action to declare void the vacation proceedings, to restrain defendants from obstructing the alley, and to compel the restoration thereof, it was within the sound discretion of the trial court to deny the relief, no substantial injury to the plaintiff being shown.

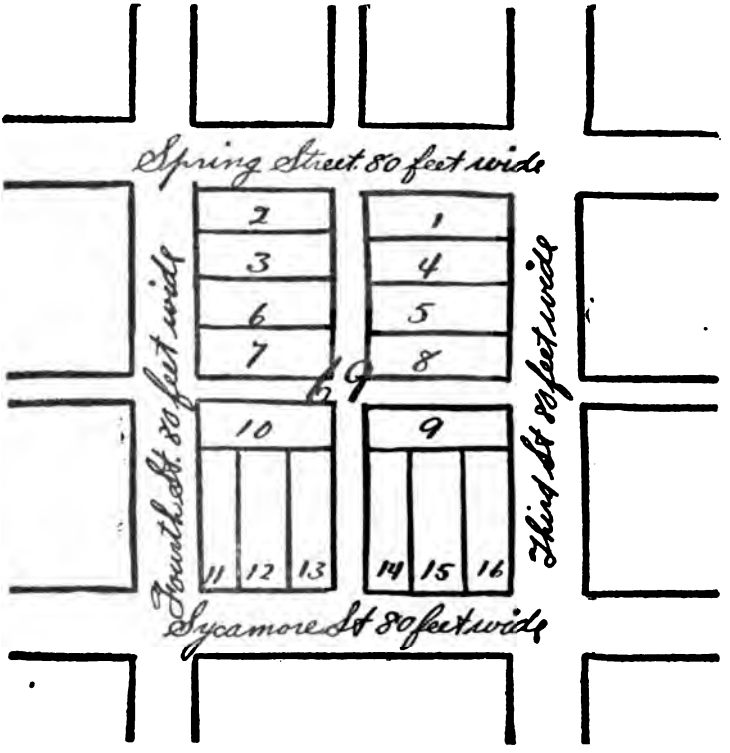
APPEAL from a judgment of the circuit court for Milwaukee county; F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

Certain real estate in what is now the city of *Milwaukee* was platted in 1835. Block 69 was shown on the plat as in the diagram on page 491.

Spring street as shown on this plat is now Grand avenue. The alleys shown therein were twenty feet in width. The plaintiff is lessee of the west half of lots 1 and 4 and of all of lots 5 and 8, together with the buildings thereon. The plaintiff's lease extends to July, 1922. It also has an option from the lessor to purchase the premises which it occupies.

The defendants are lessees of a portion of the west half of block 69, abutting on both sides of the east and west alley. By ch. 134, Laws 1887, the legislature attempted to vacate that portion of the north and south alley lying to the north of the north line of the east and west alley, and also to narrow

the east and west alley five feet on its north and five feet on its south side, so as to leave it a width of ten feet. Plaintiff alleges and defendants admit that the legislation was void. The abutting owners acted on the theory that the legislation was valid, and the north end of the north and south alley was



closed and buildings were erected thereon. The building now held under lease by the plaintiff occupies the east half of this portion of the alley, as well as part of the five-foot strip on the north side of the east and west alley. On the east end of the ten-foot strip of this alley which was not vacated there are encroachments which render its use by teams difficult if not impossible. The south half of the north and south alley

as originally platted does not appear to have been encroached upon or interfered with.

In June, 1911, proceedings were instituted in the common council of the city of *Milwaukee* for the vacation of the westerly 150 feet of the east and west alley, pursuant to the provisions of ch. VI of the city charter. An attempt at least was made to follow the charter provisions in carrying out the vacation proceedings. The court found that such provisions were substantially complied with. The plaintiff insists that they were not, and that in any event the law was void in so far as it affected the rights of the plaintiff in the alley in question which were peculiar to itself and not shared in by the general public. These proceedings were completed during the year 1911. The defendants, apparently relying on the validity of the vacation proceedings, started the erection of a building on the premises leased by them, which inclosed the portion of the east and west alley which the city had attempted to vacate. Thereafter the plaintiff brought this action to declare void the vacation proceedings and to enjoin and restrain the defendants from obstructing the west half of the east and west alley as originally platted and to compel the defendants to fill in an excavation which they had made in said alley and to restore the same to its former state of usefulness, the plaintiff claiming that, inasmuch as its property abutted on said alley, it was entitled to have same kept open and unobstructed through the entire block. It was set forth by appropriate averment that the west portion of the alley attempted to be vacated was used by and was useful to the plaintiff and that it had a property right in the entire alley by virtue of this lease, which granted to it the privileges and appurtenances appertaining to the property contained in the lease. This action was commenced November 7, 1911. At this time the excavation for the new building had been made and the building was partially constructed. There were some steel beams in place over the alley. The city of *Milwaukee* was named as one of the defendants because part of the relief

sought was to declare void the proceedings by which it attempted to vacate the portion of the alley in question.

The court found, among other things, that the proper steps were taken by the city to vacate the portion of the alley in question; that the value or usefulness of the plaintiff's interest in the premises described in the complaint has not been materially diminished or affected by the vacation or closing of such portion of the alley; that the plaintiff was itself maintaining an encroachment upon the east half of the east and west alley, and that the building which it occupied covered the east half of the north half of the north and south alley, and that it was guilty of the same kind of interference in respect to the alley referred to as is charged against the defendants; that under the circumstances disclosed by the evidence it would be contrary to equity to permit the plaintiff to maintain this action; that the plaintiff did not at the time of the commencement of the action have any private easement or property rights in the westerly 150 feet of the east and west alley; that the vacation or closing of said portion of the alley did not and does not have the effect to deprive the plaintiff, as lessee of the premises described in the complaint, of free access to and from the surrounding streets or to and from the system of public streets in the city of *Milwaukee.* In accordance with these findings, and conclusions of law based thereon, judgment was entered dismissing the complaint.

For the appellant there was a brief signed by *Van Dyke, Shaw, Muskat & Van Dyke,* attorneys, and *Thomas M. Kearney,* of counsel, and oral argument by *George D. Van Dyke.*

For the respondents *Milwaukee Boston Store* and *Herzfeld-Phillipson Company* there was a brief by *Flanders, Bottum, Fawsett & Bottum,* attorneys, and *W. H. Timlin, Jr.,* of counsel, and oral argument by *Mr. C. F. Fawsett* and *Mr. Timlin.*

For the respondent *City of Milwaukee* there was a brief by *Daniel W. Hoan,* city attorney, and *Mark A. Kline,* assistant city attorney, and oral argument by *Mr. Kline.*

BARNES, J. When this action was begun the plaintiff's lease still had substantially eight years to run. Plaintiff also had an option to purchase during the life of the lease, which had not been taken advantage of up to the time the action was tried. The court found that the value or usefulness of the plaintiff's interest in the premises described in the complaint had not been materially diminished or affected by the vacation or closing of the westerly 150 feet of the east and west alley. The court also found that the plaintiff was occupying the east half of the north half of the north and south alley which was vacated or attempted to be vacated under the provisions of ch. 134 of the Laws of 1887, and also a portion of the north five feet of the east half of the east and west alley, which was vacated at the same time and by virtue of the same authority. It was contended by plaintiff on the trial and it is contended in this court that this act of the legislature was void. The trial court was of the opinion that if plaintiff was hampered in the matter of ingress to or egress from the rear of the leased premises it was itself as responsible for its situation in this regard as were the defendants. It was further found that the defendants in good faith relied upon the validity of the vacation proceedings before the common council of the city of *Milwaukee.* It appeared from the evidence that the basement of the new building had been excavated and that the building had at least been partially constructed over the alley before the action was begun, and that no preliminary injunction was sought.

As conclusions of law the court found that the act of the legislature in 1887 was unconstitutional and void, as were all the proceedings taken under it to vacate the portions of the alley that were attempted to be vacated, and that to allow the plaintiff to maintain the action would be contrary to the rules and practice of equity, and the complaint was dismissed for want of equity. The court also held that the vacation proceedings carried on by the common council of the city of *Mil-*

waukee were regular and valid, and that by virtue of such proceedings the defendants had the right to construct and maintain the building which they had erected over and across the alley.

Numerous questions are discussed in the elaborate briefs which have been filed in the case. Some of these questions are important, and there is a wide divergence of authority as to what the law is. Whether the plaintiff had a special property right in the alley not common to the general public, whether, if such right existed, it could be condemned, whether, if it could be condemned, the statute under which the proceedings were carried on was valid, and whether, if valid, the city charter was not violated in essential particulars in carrying on the proceedings, are questions which we do not feel called upon presently to decide, having reached the conclusion that the finding that plaintiff suffered no substantial damage is sustained by the evidence, and having reached the further conclusion that under the facts of the case it was within the sound discretion of the court to refuse relief by way of mandatory injunction.

We may for the purposes of this appeal assume, without deciding, that plaintiff would have a standing in court had it made a showing of substantial injury. Considerable evidence was offered *pro* and *con* on this issue. It would serve no useful purpose to discuss this evidence in detail, and we pass it with the remark that the finding of fact made is not against the clear preponderance of the testimony.

A lessee has a right to protect his leasehold interest against unlawful interference therewith. However, the plaintiff hardly stands in the same position before the court as would the owner. The owner, looking into the future and anticipating a change in conditions, might have serious objections to the closing of an alley adjacent to his premises for which he had no immediate use, where a lessee would have no cause for complaint, provided his needs or conveniences did not re-

quire that the alley be kept open presently or during the term of his lease. Here the owner is not objecting to the closing of the alley, and presumably is willing that it should be closed, and plaintiff suffers no substantial damage from its being closed. To require the defendants to tear down a twenty-foot strip through the middle of the large building which it has erected would entail upon them a large amount of expense without any real benefit resulting to the plaintiff. The plaintiff has not taken advantage of its option to purchase, and may never do so, and, while it probably has a right to enforce specific performance if it elects to exercise its right, and to this extent has an interest in the real estate under the option, we do not think it is such an interest as would entitle it to the relief here sought. *Sixta v. Ontonagon Valley L. Co.* 157 Wis. 293, 305, 147 N. W. 1042. The plaintiff's right must rest in the fact that it is a lessee in possession.

While the power to issue mandatory injunctions is vested in courts of equity, it is a power which is sparingly used. High, Injunctions, § 2. The granting of an injunction rests in the sound discretion of the court. *Kulinski v. Dambrowski,* 29 Wis. 109, 115. The power itself being great, a high degree of judgment is required in order to use it wisely and never to abuse it. *State ex rel. Superior v. Duluth St. R. Co.* 153 Wis. 650, 654, 142 N. W. 184. While equity will restrain a private nuisance, relief will not be granted in every instance of alleged nuisance. The present or threatened injury must be real and not trifling, transient, or temporary. 4 Pom. Eq. Jur. (3d ed.) § 1350. Most American courts adopt the view that in cases involving the right to the use of easements, substantial damage is necessary to support an injunction. 6 Pom. Eq. Jur. § 548. Ordinarily where an injunction will cause great injury to the defendant and will confer little or no benefit in comparison upon the plaintiff, it is within the discretion of the court to refuse it. *Brande v. Grace,* 154 Mass. 210, 31 N. E. 633; 22 Cyc. 782 and cases cited. Equity should not be successfully invoked merely to

inflict injury or damage on the defendant without securing any substantial right or benefit to the plaintiff. This was said in an action brought to remove an obstruction from an alleged street, the dedication of which had not been accepted and the plaintiff asserting the right to have the same kept open. *Mahler v. Brumder,* 92 Wis. 477, 66 N. W. 502. Courts generally exercise their discretion against issuing an injunction, where it will produce great public or private mischief, merely to protect technical, doubtful, or unsubstantial rights. In such a case the plaintiff is relegated to his remedy at law to recover damages. *Gray v. Manhattan R. Co.* 128 N. Y. 499, 28 N. E. 498, and cases cited; *Bassett v. Salisbury Mfg. Co.* 47 N. H. 426; *Demarest v. Hardham,* 34 N. J. Eq. 469; *Nowak v. Baier,* 78 N. J. Eq. 112, 77 Atl. 1062; *Springfield v. Springfield St. R. Co.* 182 Mass. 41, 64 N. E. 577; *Methodist E. Soc. v. Akers,* 167 Mass. 560, 46 N. E. 381; *Aynsley v. Glover,* L. R. 18 Eq. Cas. 544, 552. A defendant will not ordinarily be compelled to pull down an expensive structure merely because some legal right may be invaded, if the injury complained of is slight and if the acts complained of were performed in good faith and on the belief that the party was acting within his legal rights. *Cobb v. Massachusetts C. Co.* 179 Mass. 423, 60 N. E. 790; *Hunter v. Carroll,* 64 N. H. 572, 15 Atl. 17; *Engle v. Thorn,* 3 Duer, 15.

The case of *Tilly v. Mitchell & L. Co.* 121 Wis. 1, 98 N. W. 969, is perhaps relied on more strongly than any other case cited on this branch of the case by the appellant. There, however, the plaintiff's damages were held to be substantial. This was also the case in *Schuster v. Milwaukee E. R. & L. Co.* 142 Wis. 578, 126 N. W. 26.

We conclude that it was within the sound discretion of the trial court to refuse the injunction prayed for.

By the Court.—Judgment affirmed.

TIMLIN, J., took no part.

HARRIS, Respondent, vs. HOYT, Appellant.

October 27—November 16, 1915.

Dogs: Liability of owner for injury to person: Trespassers: Negligence of owner.

1. Sec. 1620, Stats. 1913, abrogates the necessity of alleging and proving *scienter* on the part of the owner or keeper of a dog which has injured a person or property, but does not impose an absolute liability for such injury.
2. Plaintiff, wishing to visit a lady who lived upstairs in a duplex flat, entered a door from the street into a common vestibule, from which a door to the right led to the lower flat occupied by defendant, and a door to the left led to the upstairs flat. The two doors were about a foot apart. Plaintiff had never been in the flat before. She rang the bell of the upper flat and was told to come up by the occupant thereof, who pressed the electric button which released the lock of the door leading to it. Plaintiff tried the left-hand door, which she thought led to the upper flat, but as it did not readily open she concluded it was the wrong door, and tried the right-hand door, which opened and a dog came out and bit her while she still had her hand on the door knob. *Held*, that plaintiff was not a trespasser at the time she was injured.
3. A jury in the Milwaukee civil court having found that defendant was negligent in the keeping of the dog, having in mind the prevention of injuries to any person, and the civil court having set aside the verdict and dismissed the action, it is *held* that under the evidence the circuit court was not clearly wrong in reversing such judgment and granting a new trial on the ground that whether defendant was negligent was properly a jury question.

BARNES, J., dissents.

APPEAL from an order of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

Action to recover damages resulting from being bitten by a dog kept by the defendant. August 5, 1914, plaintiff desired to visit a Mrs. Karrow, who lived upstairs in a duplex flat, the lower flat being occupied by the defendant. A common door opened from the street into a vestibule three or four feet deep and eight feet wide. From this common vestibule the door to

the right led to the flat of the defendant and the door to the left to the flat upstairs occupied by Mrs. Karrow. The two doors were about a foot apart. Plaintiff had never been in the flat before. After entering the common vestibule she rang the bell leading to Mrs. Karrow's flat. Mrs. Karrow answered immediately and asked who was there. On being informed she told plaintiff to come up, and pressed the electric button that released the lock of the door to her flat. The plaintiff heard the click of the released lock, took hold of the left-hand door which she supposed was the one leading to Mrs. Karrow's flat, but as it did not readily open she concluded she was attempting to open the wrong door, so she took hold of the right-hand door, opened it far enough so that the dog kept by the defendant could pass through, which he did, and bit her while she still had her hand on the door knob. The defendant was about sixty years old and kept the dog—a French bull—for a companion, as she was left alone a great deal. It had never given any trouble before except once about eighteen months previously, when it was in the house and a boy opened the door and it bit the boy's hand. On the day in question the defendant was in the dining room with the dog, and on hearing a noise at the door she spoke to the dog and said "There comes Harlowe," meaning her son, and the dog immediately ran for the door with the result stated. Defendant's door was usually locked, but owing to its swelled condition it had not been shut tight enough to permit the lock to catch at the time of plaintiff's injury.

The action was begun in the civil court, where the jury found (1) that plaintiff was free from contributory negligence; (2) that the defendant failed to exercise ordinary care in the keeping of the dog, having in mind the prevention of injuries to any person; and (3) damages in the sum of $925.50. The court, however, set aside the verdict and entered judgment dismissing the action. From such judgment plaintiff appealed to the circuit court. That court entered an

order reversing the judgment of the civil court, and granted a new trial in the circuit court, from which order the defendant appealed.

For the appellant there was a brief by *Cochems & Wolfe*, and oral argument by *H. O. Wolfe*.

For the respondent the cause was submitted on the brief of *Curtis & Mock*.

VINJE, J. Defendant correctly contends that sec. 1620, Stats. 1913, does not impose upon the owner or keeper of a dog an absolute liability to respond in damages to any one bitten by it no matter under what circumstances. The section provides:

"The owner or keeper of any dog which shall have injured or caused the injury of any person or property or killed, wounded or worried any horses, cattle, sheep or lambs shall be liable to the person so injured and the owner of such animals for all damages so done, without proving notice to the owner or keeper of such dog or knowledge by him that his dog was mischievous or disposed to kill, wound or worry horses, cattle, sheep or lambs."

Its purpose was to abrogate the necessity of alleging and proving *scienter* on the part of the owner or keeper, not to impose an absolute liability. *Schaller v. Connors*, 57 Wis. 321, 15 N. W. 389; *Meracle v. Down*, 64 Wis. 323, 25 N. W. 412; *Legault v. Malacker*, 156 Wis. 507, 145 N. W. 1081. But it does not follow from this that the circuit court erred in setting aside the judgment of the civil court and in granting a new trial. It was evidently the opinion of the court that a jury might properly find defendant guilty of a want of ordinary care in keeping the dog at home, as she did, where it might injure any stranger who accidentally, as the plaintiff did, or otherwise, opened the door to the flat where it was kept. Can we say that such a conclusion was clearly erroneous? In order to reverse we must be able to do that. Plaintiff was not a trespasser at the time she was injured. She was right-

fully in the vestibule when the dog bit her. The mistake of opening the wrong door as she did was one that might happen to any one, and did not spell negligence on her part. The construction of the entrances of the two flats was such that a jury might reasonably conclude the defendant ought to have anticipated that such a mistake as the plaintiff made might readily occur and hence she should have kept the dog so secured that he could not injure an innocent intruder. It is shown also that she had knowledge of the fact that the dog had once before under very similar circumstances bitten the hand of a boy who was opening the door of a room where it was.

Defendant relies upon the rule as to the duty owing to trespassers stated in *Zartner v. George,* 156 Wis. 131, 145 N. W. 971. For the reason already stated that plaintiff in this case was not a trespasser, as well as for the further reason that the rule in *Zartner v. George* applied obviously to the physical condition of the premises and not to the keeping of vicious animals, it can have no application to the instant case. Just how far the fact that plaintiff is a trespasser, where such is the case, may modify the rule of liability need not be determined. The authorities, however, are quite uniform that the mere fact of plaintiff being a trespasser is not always a complete defense. *Meibus v. Dodge,* 38 Wis. 300; 1 Ruling Case Law, p. 1123; 3 Corp. Jur. pp. 97 *et seq.*

Since there must be a new trial in which a jury will pass upon the question of defendant's negligence in keeping the dog under the circumstances shown by the evidence, we forbear to comment upon its probative force on that question further than to state that it can support a finding either way.

By the Court.—Order affirmed.

BARNES, J. (*dissenting*). I think the plaintiff was technically a trespasser, in that she entered a private dwelling place without license or invitation. It was no fault of de-

fendant that plaintiff made a mistake. This question aside, in my judgment the defendant should not be held liable. She was sixty years of age and "was left alone in the house a great deal, particularly nights—sometimes in the daytime, and many times a week alone in the building." She testified without contradiction that she kept the dog to look after her and to take care of her. She had owned the dog for seven years, and once about eighteen months before it had bitten a boy slightly, under just what provocation does not appear, but it occurred on the back doorstep outside of the house in which plaintiff was then living. When taken out of the house in Milwaukee the dog was always held in leash. During an existence of seven years this animal had only one mark to his discredit, which would be a good record for most members of the animal kingdom. This dog was not a man-eater. I think the defendant had a right to keep him in her home for companionship and protection against marauders, and that she was not guilty of any negligence in so doing. I further think that a person may keep a dog in his house without being negligent, where he knows that the animal will bite intruders. A caller may make a mistake as to the door which should be entered in order to call on another, but this does not justify the caller in promiscuously opening doors and intruding into other places. There is one invariable custom that is pursued in such cases, and that is to knock, and await a response and an invitation to enter before doing so. The plaintiff says she had an invitation to enter in this instance, from the lady on whom she intended to call, but, finding that what she supposed was the right door did not open easily, she concluded to try the other one. Assuming that plaintiff was not a trespasser, the meat of the case is here: Defendant had a right to suppose that no one except a member of her family, or perhaps a licensee, would enter her apartments except by invitation. Can it be said that she should reasonably have anticipated that some person desiring to call on her neighbor

and who had knocked at her neighbor's door and had been bidden to enter, would then attempt to enter by another door leading to another apartment? I do not think so. I am entirely in sympathy with the rule that, where a person is in a place where he has a right to be and is, without provocation, bitten by a dog, the owner should be held responsible. I do not think the rule should be extended to a home where a dog has a right to be and where the person bitten has no such right; and whether she was a trespasser or not, plaintiff had no right to open defendant's door without invitation.

PIRIE, Administrator, Appellant, vs. LE SAULNIER and another, Respondents.

October 27—November 16, 1915.

Gifts: Delivery: Acceptance: Custody in third person: Evidence: Statements of person since deceased: Assignment of note and mortgage: Reservation of benefit to donor.

1. A purpose to make a gift of property can only be consummated by the donor actually parting with possession of and dominion, as owner, over the subject by an absolute delivery thereof to the donee, or some one for such donee, and an acceptance by the latter.
2. Delivery to the agent of a donee to control the title for him, the agent being actually in possession and control as such, is sufficient to complete a gift.
3. Title to property may be vested by one person in another, as donee, and custody remain in a third person, as bailee, conditioned to turn the subject over to the donee after the death of the donor.
4. Statements made by one since deceased to a third person that she had made a gift of specific property to a person named are competent evidence in an action between such donee and the administrator of the estate of the deceased.
5. V., an old lady, owning a note and mortgage for $2,500 which were in possession of one L. as her agent, executed an assignment thereof, under seal and expressing a consideration, to C.,

a relative, who thereupon delivered such assignment to L., directing him to hold the securities as bailee for her (C.), but to pay the interest, and the principal if necessary, to V. for the support of the latter. L. assented thereto. Afterwards L. paid the interest to V. and also loaned her $500 on the securities. When the note was paid L. deducted the $500, and with the remaining $2,000, by direction of V., purchased two bonds for C., which he kept in an envelope labeled as the property of C. He also sent to V. a receipt stating that the bonds had been received from C., that V. was to have the interest thereon during her lifetime, and also that the bonds might be delivered to V. at any time if she should demand or require them. V. afterwards made statements to third persons that she had given the $2,000 to C. *Held*, that the trial court was warranted in concluding that there had been a good delivery and a completed gift of the property to C.

APPEAL from a judgment of the circuit court for Milwaukee county: OREN T. WILLIAMS, Circuit Judge. *Affirmed.*

Action to recover two bonds of the par value of $1,000 each. The issue involved the question of whether the bonds belonged to defendant *Margaret E. Caswell* or to the estate of Margaret Vance, deceased. Defendant *John B. Le Saulnier* had possession of the bonds and refused to surrender them until the true ownership was determined. He did not claim any personal interest in the property.

The evidence was to this effect: *Mr. Le Saulnier,* during the period the occurrences with reference to the securities took place, gratuitously looked after the financial affairs of Margaret Vance. In that capacity he became possessed of a note for $2,500, secured by mortgage on real estate, given to one Boyle, and, in due course, assigned to Margaret Vance. In 1912, she and a relative, defendant *Caswell,* visited *Le Saulnier,* who, by direction of Miss Vance, filled out for her a blank assignment transferring the mortgage and the debt thereby secured to *Margaret Caswell.* It was duly executed by Miss Vance. It was under seal and expressed a consideration. Miss Vance delivered the paper to *Miss Caswell.* She delivered it to *Mr. Le Saulnier,* instructing him to hold it and the note for her, but to pay the interest and the principal,

if necessary, to Miss Vance for her support. *Miss Caswell* resided in Colorado. Miss Vance resided in this state. After such transaction, *Miss Caswell* went to Colorado and paid no attention to the property until after the death of Miss Vance. The former left the entire handling of the property for her to *Le Saulnier* with instructions aforesaid. Pursuant thereto, *Le Saulnier* paid the interest, which he received on the securities, to Miss Vance and about one year after the assignment, he loaned her $500 thereon. Soon thereafter the note was paid to *Le Saulnier*. He then delivered the same and the mortgage to the payor and destroyed the assignment which had not been recorded. He informed Miss Vance of the payment, and she then instructed him to purchase for *Miss Caswell* $2,000 in bonds of a specified issue, which he did. They are the bonds in question. He deposited them in his safe in an envelope with this memorandum thereon: "Property of *Margaret Caswell,* Palmer Lake, Colorado. Deliver to her only upon return of my receipt." He then mailed to Miss Vance a receipt, worded as follows:

"Milwaukee, June 13, 1913.

"Received of *Margaret E. Caswell* of Palmer Lake, Colorado, two thousand dollars bonds of the Milw. Electric Ry. & Light Company, bearing 5% interest, due 1926, without the interest 1913 coupons which have been cut off and accounted for, for collection. And it is specially agreed that Miss Margaret Vance of Milwaukee is to receive the interest on said $2,000 bonds during her lifetime, and also that said estate of Rudolph Nunnemacher may deliver said bonds to said Margaret Vance at any time Miss Vance should demand or require them.

"ESTATE OF RUDOLPH NUNNEMACHER,
"Le Saulnier."

Notwithstanding the form of the receipt, *Le Saulnier* was the receiptor in his personal capacity. *Miss Caswell* was not communicated with in regard to the matter. *Le Saulnier* acted, as he supposed, in harmony with the understanding at the time of the assignment. Miss Vance held the receipt up

to the time of her death, which occurred August 11, 1913. Shortly thereafter *Miss Caswell* visited *Le Saulnier* and demanded the bonds. He handed the same to her. She handed them back and requested him to keep them for her. They remained in his possession until he produced them upon the trial of this case. When the $500 was furnished Miss Vance, it was a loan on the securities and was paid out of the receipts therefrom. She used the $500 to obtain entrance to a charitable institution for old people. The rules thereof were that patrons should contribute any property they might have thereto. She said she had given her $2,000 to *Miss Caswell,* her niece, and so could not give it to the home—that the $2,000 was in trust with *Mr. Le Saulnier,* and at her death it was to go to *Miss Caswell.* She instructed *Le Saulnier* to invest the $2,000 for *Miss Caswell* on the occasion of her visiting his office in respect to the matter. She was accompanied by the woman with whom she boarded, who testified to what occurred. She said that Miss Vance directed *Le Saulnier* to invest the money for *Miss Caswell;* that she wanted the interest received on the bonds as long as she lived, but, otherwise, the bonds were the property of *Miss Caswell.*

Evidence which the court permitted *Le Saulnier* to give as to his transaction with Miss Vance at the time of the assignment, was taken under objection as was also some other evidence.

At the close of the evidence, the court decided, as a matter of law, that the bonds were the property of *Miss Caswell.* Judgment was rendered accordingly with costs in defendant's favor, and the plaintiff appealed.

For the appellant there were briefs by *Morris & Canright,* and oral argument by *G. S. Canright.*

Lawrence A. Olwell and *Bernard V. Brady,* for the respondents.

MARSHALL, J. Counsel for appellant concede, and we agree, that the facts in this case are undisputed, as the trial

court held, and that the question to be decided is, Was a right conclusion reached as to the legal effect of such facts? That renders the question as to the admissibility of evidence immaterial, though counsel discuss some such questions to which we will briefly refer. Unless the trial court was clearly wrong in holding that *Miss Caswell* became the owner of the property in controversy by gift from Miss Vance, the judgment must be affirmed.

It is elementary that a purpose to make a gift of property can only be consummated by the donor actually parting with possession of and dominion, as owner, over the subject by an absolute delivery thereof to the donee, or some one for such donee, and an acceptance by the latter. Counsel for appellant so contend and counsel for respondents do not contend to the contrary. Indeed the law in respect to the matter is so firmly settled that citations of authority in respect thereto seem unnecessary. The following are but a few of the cases on the subject found in our own books: *Wilson v. Carpenter,* 17 Wis. 512; *Resch v. Senn,* 28 Wis. 286; *Wells v. Collins,* 74 Wis. 341, 43 N. W. 160; *Kellogg v. Adams,* 51 Wis. 138, 8 N. W. 115; *Wilcox v. Matteson,* 53 Wis. 23, 9 N. W. 814; *Second Nat. Bank v. Merrill,* 81 Wis. 142, 50 N. W. 503; *Dickson v. Bills,* 144 Wis. 171, 128 N. W. 868.

Counsel for respondents rely, in part, on evidence given by *Le Saulnier* as to what occurred between him and Miss Vance at the time it is claimed she assigned the note and mortgage to *Miss Caswell.* Counsel for appellant contend that *Le Saulnier* was incompetent to give such evidence, under sec. 4069, Stats. Waiving that question, which we may well do, he was competent to testify to what occurred between himself and *Miss Caswell.*

So there was competent and, we must say, pretty conclusive evidence that *Le Saulnier* received an assignment, executed by Miss Vance, of the mortgage and debt secured thereby, to *Miss Caswell,* from the hands of the latter, that he was directed to hold the securities as bailee for her, and that he as-

sented thereto. Such circumstances, with the subsequent declarations by Miss Vance to third persons, pretty conclusively show that her intention was to part with dominion over the securities for the purpose of consummating her intention to make a gift thereof to *Miss Caswell.*

The declarations made by Miss Vance to third persons that she had given the property in question to *Miss Caswell* were proper. *Pritchard v. Pritchard,* 69 Wis. 373, 34 N. W. 506; *Taylor v. Thieman,* 132 Wis. 38, 111 N. W. 229. In the first of those cases, the court said, that statements made by a deceased person to a third party that he had made a gift of specific property to a person named, are competent evidence in an action between the donee and the administrator of the estate of the deceased.

Without discussing the evidence in detail, it is our conclusion that *Le Saulnier* was made, by *Miss Caswell,* her bailee of the securities, Miss Vance to have the income so long as she lived and such of the principal as necessary for her support. If such be the fact, the circumstance that the latter was to have the benefit, as stated, would not defeat the purpose to make a gift, as will be seen from authorities hereafter cited, nor would what was subsequently done change the situation.

The evidence of what occurred after delivery of the assignment to *Le Saulnier* is consistent with the idea that what occurred at first was for the purpose of making a gift. The declarations made by Miss Vance that she had given her $2,000 to *Miss Caswell* are quite significant, as is also the fact that when the note was paid, Miss Vance requested that the money be invested in bonds for *Miss Caswell,* and the further fact that the former received the paper, showing that such investment had been made, and held it until the time of her death, thus, impliedly, confessing that the bonds were held by *Le Saulnier* as the property of *Miss Caswell.* Taking all the circumstances into consideration, particularly that

Miss Vance was an old lady, dependent for support upon the use of the property represented by the securities, it seems that the trial court was warranted in holding that *Le Saulnier* was made bailee of the securities for *Miss Caswell,* to hold the same for her as owner, subject to the benefit reserved, and without any authority in Miss Vance to resume control as owner.

So the case does not fall within the doctrine that the mere delivery of the assignment of a mortgage does not constitute delivery of the note secured thereby so as to pass title and execute a purpose to make a gift to the assignee. The trial court properly considered all the circumstances and the evident intention. It was not essential to a delivery of the note that it should pass into the hands of *Miss Caswell* and then be delivered by her to *Le Saulnier* to constitute an efficient change of control from Miss Vance to *Miss Caswell. Le Saulnier* having possession of the note, and having accepted delivery of the assignment accompanied by instructions to hold all for *Miss Caswell,* and agreed to account to her, but to let Miss Vance have the income and such of the principal as necessary for her support, that constituted a good delivery of the entire property to *Miss Caswell,* if such was the intention, as seems clearly to have been the case.

The circumstance that *Miss Caswell* consented to her bailee using her property for the support of Miss Vance, so far as needed, does not militate, necessarily, against an actual change of title. That is consistent with *Tobin v. Tobin,* 139 Wis. 494, 121 N. W. 144. Delivery to the agent of a donee to control the title for him, the agent being actually put in possession and control as such, is sufficient to complete a gift. *Davis v. Ney,* 125 Mass. 590; *Telford v. Patton,* 144 Ill. 611, 33 N. E. 1119.

Miss Caswell does not appear to have been directly a party to the making of the paper which was delivered to Miss Vance after the investment in the bonds. If that departed from the

original understanding, *Miss Caswell* was not bound thereby. Such understanding does not seem to have contemplated possession of the securities by Miss Vance at any time after the making of the assignment. Construing the last transaction in the light of the first, it seems that the idea of letting Miss Vance take the securities, if she desired, was not that she might take as owner but merely to collect the interest reserved for her benefit.

The conclusion reached by the trial court seems to be well supported by all the circumstances and by authority. *McNally v. McAndrew,* 98 Wis. 62, 73 N. W. 315; *Will of Klehr,* 147 Wis. 653, 133 N. W. 1105; *Tucker v. Tucker,* 138 Iowa, 344, 116 N. W. 119; *Jones v. Nicholas,* 151 Iowa, 362, 130 N. W. 125; *Shepard v. Shepard,* 164 Mich. 183, 129 N. W. 201.

In *McNally v. McAndrew,* the notes and mortgage were delivered by a father to his son, it being understood that the donor was to have the interest as long as he lived. Later the notes were delivered back to the donor, that he might collect the interest, and they remained in his possession up to the time of his death. Those circumstances, together with evidence that the donor stated to third persons that he had given the securities to his son, were held to be consistent with the delivery to the latter, having been intended to take effect, *in præsenti,* as a gift.

The fact that the property was to be held by *Le Saulnier* until Miss Vance's death, but without control by her as owner, does not give the transaction testamentary character, so long as the title actually passed to *Miss Caswell. Jennings v. Neville,* 180 Ill. 270, 54 N. E. 202. Title to property may be vested by one person in another, as donee, and custody remain in a third person, as bailee, conditioned to turn the subject over to the donee after the death of the donor. *Bostwick v. Mahaffy,* 48 Mich. 342, 12 N. W. 192; *Hagerman v. Wigent,* 108 Mich. 192, 65 N. W. 756; *Davis v. Ney,* 125 Mass. 590.

In *Davis v. Ney,* A. delivered her bank book, accompanied

by an assignment, to B. upon an oral agreement that B. should draw for her whatever money she wanted during her lifetime, and pay the balance, if any left after her death, to her son. It was held that such circumstances constituted a valid gift to the son.

It follows that we cannot see our way clear to overrule the conclusion of the trial court that the property in question belongs to *Miss Caswell.*

By the Court.—Judgment is affirmed.

NEFF, Respondent, vs. RUBIN, Appellant.

October 28—November 16, 1915.

Vendor and purchaser of land: Contract construed: "Warranty deed." Parol evidence: Restrictive covenants: Incumbrances: Inability of vendor to convey as agreed: Recovery of amount paid: Waiver: Tendering return of contract.

1. A contract to convey land by "warranty deed" calls for a deed containing the usual covenants of warranty, including the covenant that the land is free and clear from incumbrances.
2. Parol evidence is not admissible to show that such a contract called for a deed containing covenants on the part of the grantee restricting the use to be made by him of the land, with reversionary provisions.
3. Existing restrictions upon the use which may be made of land by the owner, with provision for reversion in case of violation, constitute such an incumbrance as to prevent the owner from giving a warranty deed.
4. Where the vendor of land cannot convey title as agreed in the contract of sale, the vendee may refuse further payment of the purchase price and recover the amount already paid thereon.
5. A letter from the attorney of the vendee of land stating in effect that his client would carry out the agreement of sale, though advised to the contrary by the attorney, upon receipt of the warranty deed called for by said agreement, is *held* not to have been a waiver or modification of the terms of the contract.
6. Where both parties to a contract for the sale of land finally treated it as ended and stood upon their legal rights consequent upon the breaches claimed, the vendee was not required to tender a return of the writing embodying the contract in order to entitle him to recover the purchase money which he had paid.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Affirmed.*

This is an action to recover a part of the consideration paid on a land contract after an alleged rescission thereof by the plaintiff.

On the 21st day of September, 1914, plaintiff and defendant entered into a written agreement for the sale by defendant to plaintiff of certain lots in the city of Milwaukee for the price of $21,600. Plaintiff paid $600 down at the time of entering into the contract. By the contract it is agreed that: "Upon payment of five thousand dollars ($5,000), the said *W. B. Rubin* will give to said *Charles S. Neff* a warranty deed, subject to the mortgages aforesaid, together with an abstract of title. . . ."

One Louisa Veit on the 26th day of September, 1910, sold and conveyed the lots here in question to the Advance Investment Company by deed which was duly recorded in the office of the register of deeds of Milwaukee county. This deed contained the following conditions and restrictions:

"It is mutually agreed and understood by and between the parties hereto, that this deed is executed and delivered subject to the following covenants:

"1. That no building shall be erected upon said premises which shall project nearer to the center of the Lake Avenue Company toll road than sixty feet.

"2. That no part of said premises shall be used as a livery, selling or boarding stable, or for any garage other than for private use, or for the sale of intoxicating drinks, or for any other business purpose, but that the said premises shall be used solely for residence purposes.

"3. That no residence shall be constructed upon said premises that shall be of design for more than one family, and no flat or apartment house shall be erected thereon.

"4. That no residence shall be erected upon said premises that shall cost less than $5,000, and that not more than one residence shall be built upon any one lot.

"5. That all outbuildings shall be of neat design and shall not be built closer to the bluff line than thirty feet.

"6. That no billboards or advertising signs shall be placed upon any part of said lots.

"7. That each of the foregoing covenants shall remain in force for a period of fifty years from and after October 1, 1908, and shall be construed and deemed covenants running with the land, and shall bind the respective parties, their heirs, administrators and assigns, and upon the happening or suffering of either, any or all of the events or contingencies mentioned in said covenant No. 1, 2, 3, 4, 5, 6 and 7, this deed shall become forfeited, and the premises herein described and all the rights herein conveyed shall at once revert to and revest in and become the property of the party of the first part, her heirs or assigns (without any declaration or forfeiture, or act of re-entry, or without any right of the party of the second part, heirs or assigns to reclamation or compensation for moneys paid or improvements made), as absolutely and perfectly as if this deed had never been made."

On February 11, 1913, the Advance Investment Company sold and by deed conveyed the lots to the defendant, under which the defendant asserts title.

On the 13th day of October, 1914, the defendant submitted abstracts of title of the lots to the plaintiff. Upon examination of the abstracts of title and being informed of these restrictive covenants the plaintiff immediately demanded that the lots be released from these restrictions so as to enable the defendant to deliver a warranty deed thereof according to the terms of the written agreement. After negotiations between the parties the plaintiff on October 28, 1914, caused the following letter to be sent to the defendant:

"*Mr. W. B. Rubin,*

"Care Messrs. Rubin & Zabel, Milwaukee.

"Dear Sir: Replying to yours of October 26th, I am directed by my client, *Mr. Charles S. Neff,* to say that he will carry out his agreement with you.

"It is needless to say, that in this regard he is not acting in accordance with my advice.

"On receiving from you the warranty deed called for by the agreement of September 21st, he will give the mortgages required by the contract as of the date they were therein re-

quired to be executed, and make the cash payment, to wit, $5,000, together with interest thereon from the time it was due under the contract until paid.

"Will you kindly prepare the deed and mortgages required under the contract and submit them to me for examination and approval?

"Please send me at once by bearer, the abstracts of title, so that I may complete my examination of them.

"Yours very respectfully,

"(Signed) FRANK M. HOYT."

The defendant failed to have the restrictions removed and tendered a deed with these restrictions on the title, which plaintiff refused and thereupon demanded that defendant repay the $600 he had paid to defendant at the time of entering into the written contract. Defendant refused to return the money and has never returned it, hence this suit was instituted.

The circuit court directed a verdict for the plaintiff in the sum of $600 and interest on the same from November 2, 1914, amounting in all to $626. Judgment was entered accordingly, and this is an appeal from such judgment.

For the appellant there was a brief by *Rubin, Fawcett & Dutcher,* attorneys, and *W. B. Rubin* and *Paul R. Newcomb,* of counsel, and oral argument by *Mr. Newcomb.*

For the respondent there was a brief by *Frank M. Hoyt,* attorney, and *Guy D. Goff,* of counsel, and oral argument by *Mr. Goff.*

SIEBECKER, J. The defendant contracted for the sale and conveyance of the above described lots to the plaintiff, and upon payment of the consideration to give plaintiff "a warranty deed" thereof subject to the mortgages specified in the contract. The question presented is, Did the court err in refusing to receive parol evidence to show that defendant's tender to plaintiff of a warranty deed containing the restrictions above specified was a compliance with the terms of the land contract? The term "a warranty deed" in a contract for the

sale and conveyance of land has in the law the clear and definite meaning that the vendor will convey the title to the premises by deed containing the usual covenants generally inserted in a warranty deed, which includes the covenant that the land is free and clear from incumbrances. 1 Warvelle, Vendors (2d ed.) §§ 418, 419. This court at an early day held that a contract to convey by "a good and sufficient warranty deed" entitled the vendee to a warranty deed of the land "free from all incumbrances." *Davidson v. Van Pelt,* 15 Wis. 341. Other cases to the same effect dealing with such contracts and the effects of covenants to convey by deed are: *Falkner v. Guild,* 10 Wis. 563; *Bateman v. Johnson,* 10 Wis. 1; *Davis v. Henderson,* 17 Wis. 105; *Curtis L. & L. Co. v. Interior L. Co.* 137 Wis. 341, 347 (118 N. W. 853) and cases cited on p. 348; *Kramer v. Carter,* 136 Mass. 504. The term "a warranty deed," in the contract for the sale and conveyance of the lots, being in its legal meaning free from ambiguity, calls upon defendant to convey the title to the lots by deed containing the usual covenants of warranty. It follows that defendant cannot complain of the court's ruling excluding parol evidence to show that the contract called for a conveyance of the lots by a deed with restrictive covenants and reversionary provisions.

It is also well established that the restrictions on the title to the lots in question constituted such an incumbrance as to prevent defendant from giving such a warranty deed as contemplated by the contract. *Batley v. Foerderer,* 162 Pa. St. 460, 29 Atl. 868; 3 Washb. Real Prop. (6th ed.) § 2385; *Doctor v. Darling,* 68 Hun, 70, 22 N. Y. Supp. 594; *Gibert v. Peteler,* 38 N. Y. 165; *Goodrich v. Pratt,* 114 App. Div. 771, 100 N. Y. Supp. 187.

Where the vendor cannot convey title as agreed by the contract of sale the vendee may refuse further payments of the purchase price and recover the amounts paid thereon. *Falkner v. Guild,* 10 Wis. 563; *Davis v. Henderson,* 17 Wis. 105; *Harrass v. Edwards,* 94 Wis. 459, 69 N. W. 69; *Breen v.*

Arnold, 157 Wis. 528, 147 N. W. 997. It is plain that the deed tendered by the defendant under the contract of sale is not a warranty deed of the premises conveying them free from incumbrances as called for by the contract of sale.

It is argued that the plaintiff through his attorney waived the conditions of the contract of sale calling for "a warranty deed" by the attorney's letter of October 28, 1914, stating in effect that plaintiff would carry out the agreement of sale, though advised to the contrary by his attorney, on receipt from the defendant of "the warranty deed" called for by the contract of sale and conveyance. We cannot find anything in this letter, taken in connection with all of the negotiations preceding it, that can be held to be a waiver or any modification of the terms of the contract. Its contents clearly indicate that plaintiff insisted on full performance of the terms of the contract. The letter in terms clearly shows that the plaintiff stands on the contract and demands of defendant that he carry out its obligations. The deed tendered by the defendant after this correspondence does not comply with the terms of the contract and plaintiff was not required to accept it. It is manifest from the record that both parties to the contract finally treated the contract as ended and stood on their legal rights consequent to the alleged breaches. Under these facts and circumstances no further steps were required of plaintiff to tender return of the writing embodying the contract to entitle him to recover the purchase money he had paid on the contract. *Woodman v. Blue Grass L. Co.* 125 Wis. 489, 103 N. W. 236, 104 N. W. 920. The trial court properly awarded judgment for recovery of the purchase money plaintiff had paid on the contract of sale of the lots.

By the Court.—The judgment appealed from is affirmed.

KLANN, Administratrix, Respondent, vs. MINN, Appellant.

October 28—November 16, 1915.

Death from negligence: Recovery for pain, etc.: Substantial period of suffering: Pleading.

1. If a substantial period of suffering intervenes between an actionable personal injury and death resulting therefrom, damages may be recovered for such pain and suffering.
2. An allegation that "a few minutes" after plaintiff's decedent was caught by flames and exposed to burning in a building in which he was working "he then and there died from the effect of the flames and the burns which he received from them," sufficiently alleges that there was a substantial period of suffering between the injury and death.

APPEAL from an order of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

This is an appeal from an order overruling a demurrer to the first cause of action set up in the complaint. The cause of action is based upon the alleged negligence of the defendant, resulting in death of the plaintiff's intestate, Arthur Klann, and the first cause of action is for damages sustained on account of pain and suffering by deceased between the time of injury and death.

The cause was submitted for the appellant on the brief of *Orth & Orth,* and for the respondent on that of *Rubin, Fawcett & Dutcher,* attorneys, and *Paul R. Newcomb,* of counsel.

KERWIN, J. The question involved on the demurrer is whether it appears from the first cause of action that sufficient time elapsed between the injury and death to form a basis for damages, or whether the death was instantaneous. The cause of action demurred to alleges that the fire originated on the first floor of the building, spread to the second, then to the third floor where deceased was working; that there were no fire-escapes, and that a few minutes after deceased was caught

by the flames and exposed to the fire he died from the effects of the flames and burning; that the building was a frame building and outside of the fire limits of the city of Milwaukee; and that the fire department arrived before the building was destroyed, but not in time to save it.

It is argued that the allegation to the effect that "a few minutes after he was caught by the said flames and exposed to the said burning, he then and there died from the effect of the flames and the burns which he received from them," is not sufficient basis for damages for pain and suffering between injury and death.

It is the settled law of this state that if there be a substantial period of suffering between injury and death there may be a recovery of damages for such pain and suffering in a proper case. *Brown v. C. & N. W. R. Co.* 102 Wis. 137, 77 N. W. 748, 78 N. W. 771; *Johnson v. Eau Claire,* 149 Wis. 194, 135 N. W. 481; *Moyer v. Oshkosh,* 151 Wis. 586, 139 N. W. 378.

We think the allegations of the complaint in the instant case are sufficient to admit evidence that a substantial period of suffering existed between injury and death. On demurrer admitting all the allegations of the complaint well pleaded, every reasonable intendment must be made in favor of the pleading. *Downer v. Tubbs,* 152 Wis. 177, 139 N. W. 820; *Pulp W. Co. v. Green Bay P. & F. Co.* 157 Wis. 604, 147 N. W. 1058; *Laun v. Kipp,* 155 Wis. 347, 145 N. W. 183.

Upon the allegations of the complaint the deceased died "a few minutes" after he was caught by the flames and exposed to the burning. "Few" is a relative term and of great elasticity of meaning. *Anderson v. Williams* (Pa.) 44 Wkly. Notes Cas. 418; 3 Words & Phrases, 2753.

In *Indianapolis St. R. Co. v. Robinson,* 157 Ind. 414, 61 N. E. 936, it was held that the term "few," when applied to travel on a street railroad, might mean fifty persons or five hundred.

In *Brown v. C. & N. W. R. Co.* 102 Wis. 137, 149, 77 N. W. 748, 78 N. W. 771, this court said:

"The complaint demurred to, by sufficient allegations, shows that plaintiff's intestate was injured by actionable negligence of the defendant, and that he lived thereafter some period of time. The length of time he survived the injury is not stated and is not material except as to the damages recoverable, and that does not go to the cause of action."

See, also, the following cases: *Bancroft v. B. & W. R. Corp.* 11 Allen, 34; *Hollenbeck v. Berkshire R. Co.* 9 Cush. 478; *Tully v. Fitchburg R. Co.* 134 Mass. 499; *Chandler v. N. Y., N. H. & H. R. Co.* 159 Mass. 589, 35 N. E. 89; *Corcoran v. B. & A. R. Co.* 133 Mass. 507; *Kellow v. C. I. R. Co.* 68 Iowa, 470, 23 N. W. 740, 27 N. W. 466.

We think the plaintiff has sufficiently alleged that there was a substantial period of suffering between the injury and death, hence a good cause of action is stated.

By the Court.—The order appealed from is affirmed.

ZWIETUSCH and another, Respondents, vs. VILLAGE OF EAST MILWAUKEE, Appellant.

October 28—November 16, 1915.

Villages: Widening street: Condemnation of land: Damages: Deduction of special benefits: Statute construed.

1. From the fact that the market value of the remainder of a tract of land is the same as the market value of the whole tract before a strip was taken therefrom for the widening of a street, it does not necessarily follow that such market value was kept up or restored by benefits equal to the market value of the strip taken.
2. Under sec. 899, Stats. 1913, where land is taken by a village for a street or other public improvement, "the special benefit, if any,

to be enjoyed" by the owner "from such improvement" is to be offset or deducted, not from "the value of the land taken," but only from "the damage otherwise sustained," if any. *Holton v. Milwaukee*, 31 Wis. 27, distinguished.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

George H. Gabel, for the appellant.

For the respondents there was a brief by *Edgar L. Wood,* attorney for *Zwietusch,* and *Charles E. Wild,* attorney for *First Savings & Trust Company,* and oral argument by *Mr. Wild.*

TIMLIN, J. This cause reached the circuit court by appeal from an appraisal of damages in condemnation by the appellant village of a strip of land for the purpose of widening a street. By special verdict the jury found that the value of the seven-foot strip of land proposed to be taken was $600, that there was no damage to the residue, and, under instructions of the court to the effect that there was no evidence to warrant a finding of benefits, found there were no benefits. Quoting from appellant's brief:

"The trial court practically instructed the jury that there was no evidence of any benefits and pursuant thereto the jury so found. That finding is absolutely contradictory to the finding that respondents sustained no damage, as the evidence is undisputed that the strip of land taken had a certain market value."

Appellant's counsel concedes that there was no testimony as to the value of the benefits in dollars and cents, but claims there was testimony by inference that the benefits were equal to the value of the land taken, and that inference, he thinks, is to be derived from the following: There being no damage to the residue of the land and that residue being worth as much as the whole tract was before the seven-foot strip was taken; the area being diminished and the market value remaining the same, it followed that the value of the former

area must have been reduced and the diminished area must have been enhanced in value or benefited in the sum of $600, the found value of the strip taken.

In the first place this argument contains the fallacy of comparing a mathematical quantity, namely, area, with the nonmathematical concept, value, when these two, although often related, have no necessary relation. For illustration, a lot 50 by 150 feet may be worth as much as an otherwise like lot in the same plat 50 by 155 feet, or a lot 30 by 120 feet as a lot 33 by 120 feet. Where utility or other controlling factor of value is proportionate to size or area, then value usually increases in proportion to increase in size or area; but where this relation does not exist, as in case of lots for residence purposes where a given area will serve for all buildings and conveniences, no such result follows. In short, it does not follow from the fact that the market value of the remainder of a tract continues as before the excision that such market value was kept up or restored by benefits equal to the market value of the excised portion. The tract in question, we must presume, will cut up into as many salable lots of equal market value without this seven-foot strip as with it.

There is another weakness in appellant's position which may be set forth as follows: Sec. 899, Stats. 1913, under which this condemnation was had, so far as relevant here is as follows:

"The jury shall render . . . a verdict or appraisement of damages, specifying therein the damages of each owner, and separately the value of the land taken from each, and the damage otherwise sustained by each by reason of the taking thereof, in estimating which they shall deduct therefrom the special benefit, if any, to be enjoyed by each from such improvement."

It will be noticed that the verdict must contain two separate findings, namely, the value of the land taken and the damages. The last mentioned is followed by the relative

clause, "in estimating which they shall deduct therefrom the special benefit, if any."

"By what is known as the doctrine of the 'last antecedent,' relative and qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to or including others more remote, unless such extension is clearly required by a consideration of the entire act." 36 Cyc. 1123, *j*, and cases cited; 2 Lewis's Sutherland, Stat. Constr. (2d ed.) §§ 420, 421; *Jorgenson v. Superior,* 111 Wis. 561, 87 N. W. 565.

There is no reason for disturbing the ordinary grammatical relation of the component parts of this sentence; no absurd and no inequitable result follows if we give the sentence its ordinary meaning. On the other hand, if we construe the sentence as requiring benefits to be offset against the value of the land actually taken we enter a field of constitutional law in which there is much conflict of authority elsewhere. In 15 Cyc. 764–767, this conflict is noticed and the state courts ranged on either side of the question. The appellant relies upon the interpretation given to a provision in the city charter of Milwaukee in *Holton v. Milwaukee,* 31 Wis. 27, and perhaps in some other cases. The provision of statute construed in the case last cited is quite different from that here involved:

"Sec. 11. . . . They shall proceed to make their assessment, and determine and appraise, to the owner or owners, the value of the real estate so proposed to be taken, and the injury arising to them respectively, in consequence of the taking thereof, which shall be awarded to such owners respectively as damages, after making due allowance therefrom for any benefit which such owners may respectively derive from such improvement. . . .

"Sec. 12. If the damage to any person be greater than the benefits received, or if the benefit be greater than the damages, in either case the jurors shall strike a balance, and carry the difference forward to a column, so that the assessment will show what amount is to be received or paid by such

owner or owners respectively, and the difference only shall, in any case, be collectible of them, or payable to them."

The foregoing charter provision speaks of two items, namely, the value of the real estate taken and the consequential injury resulting from such taking, and the latter is followed by a relative clause quite similar to that in sec. 899, *supra.* But the next section, showing that the amount which shall be payable to the owner is the difference arrived at by striking a balance between *damages* and *benefits* and that *this difference only shall, in any case, be payable to the owner,* must be taken to deprive the owner of all compensation for the land taken or else to put a construction upon the statute which will include in the words "damage to any person" not only the consequential damage, but also the compensation for the land actually taken. There was therefore a reason for departing from the ordinary grammatical construction of the sentence which does not exist with reference to sec. 899, *supra.* *Koller v. La Crosse,* 106 Wis. 369, 82 N. W. 341, follows *Holton v. Milwaukee,* 31 Wis. 27, and deals with the same form of statute. Compare, however, *Robbins v. M. & H. R. Co.* 6 Wis. 636; *Milwaukee & M. R. Co. v. Eble,* 3 Pin. 334. The jury having found no damage to the residue, there was nothing against which benefits could be offset and the instruction was not prejudicial, and the judgment should be affirmed.

By the Court.—Judgment affirmed.

DREYFUS, Respondent, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant.

October 28—November 16, 1915.

Evidence: Privileged communications: Physicians and surgeons.

Under sec. 4075, Stats. 1913,—providing in substance that no physician or surgeon shall be *permitted* to disclose information received by him while attending a patient and which information was necessary to enable him to treat such patient,—in a personal injury action a physician who treated the plaintiff after the injury was properly not permitted to state whether he treated plaintiff at that time for hernia or rupture or whether plaintiff complained to him of hernia or rupture.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

The cause was submitted for the appellant on the brief of *Van Dyke, Shaw, Muskat & Van Dyke,* and for the respondent on that of *Lehr, Kiefer & Reitman,* attorneys, and *J. Elmer Lehr,* of counsel.

WINSLOW, C. J. The plaintiff recovered a judgment of $450 against the defendant for damages sustained as the result of a slight collision between two street cars in one of which she was a passenger. There was no question as to the negligence of the defendant, and the sole question raised on this appeal which is deemed of sufficient importance to demand treatment relates to a ruling upon evidence.

The defendant called as a witness the physician who treated the plaintiff after the injury and asked him whether he treated the plaintiff at that time for hernia or rupture and whether the plaintiff complained to him of hernia or rupture. Objections to the questions were sustained and these rulings are the rulings complained of.

The plaintiff's evidence tended to show that she suffered from inguinal hernia resulting from the accident. The ob-

ject of the testimony offered was to show that the plaintiff did not complain of such an injury and that the physician did not ascertain that she had it.

We think the ruling of the trial court was correct. Sec. 4075, Stats., as amended by ch. 349, Laws 1913, provides in substance that no physician or surgeon shall be *permitted* to disclose information received by him while attending a patient and which information was necessary to enable the physician or surgeon to treat the patient. The word "permitted" in this section was inserted by the amendment of 1913 in place of the word "compelled." This is not important except that it demonstrates that the legislature desired to make it absolutely certain that the information gained by a physician or surgeon for the purpose of treating a patient should not be disclosed under any circumstances. We have nothing to do with the wisdom of this policy; our only duty is to see that it is carried out.

If the questions propounded to the physician in the present case were answered either way the statute would be set at naught.

It was the physician's duty to treat the patient for whatever disease or infirmity the diagnosis of the case showed that she had. If, therefore, he answered that he treated her for hernia, the necessary inference of fact must be that the statements or symptoms of the patient or the physician's examination tended to show that she was suffering from hernia; if he answered that he did not treat her for hernia, the inference of fact must be that such statements, symptoms, or examination tended to show that she was not suffering from hernia, but from some other difficulty. In either case the effect would be to disclose a part of the information which the statute says shall not be disclosed.

By the Court.—Judgment affirmed.

FIRST NATIONAL BANK OF MILWAUKEE, Appellant, vs. INDUSTRIAL COMMISSION and another, Respondents.

October 29—November 16, 1915.

Workmen's compensation: Industrial commission: Findings of fact, when conclusive: Death from blood poisoning: Evidence: Competency: Res gestæ: ***Report of accident: Appeal: Costs: Briefs: Excessive length.***

1. If there is any basis in the evidence for findings of the industrial commission they will not be disturbed by the court.
2. The industrial commission acting as an administrative board is not held to the same strict rule with respect to rulings on the admission of evidence as courts of law; and the admission of incompetent evidence will not operate to reverse the award if there is any basis in the competent evidence to support it.
3. Where, at about 9 o'clock of the night on which he is alleged to have suffered an injury which resulted in blood-poisoning and death, a night watchman and janitor employed in a bank appeared before another employee, sucking his thumb, and stated that he had scratched or pricked it, such statement was a part of the *res gestæ* and might be testified to by the other employee in a proceeding to recover compensation for the death.
4. A report of the accident made by the bank through its authorized agent was competent *prima facie* evidence of the facts stated therein, subject to be explained or contradicted.
5. The competent evidence in this case is *held* to support a finding of the industrial commission that deceased received the injury which caused his death on the night in question while in the employ of the bank and performing services growing out of and incidental to his employment.
6. Costs are allowed in this case for the printing of only twenty pages of an unnecessarily long brief of seventy-two pages.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

This is an appeal from a judgment of the circuit court affirming an order of the *Industrial Commission* awarding the respondent *Jennah Patch* compensation from the plaintiff for the death of her husband, Asa A. Patch. Asa A. Patch died April 9, 1914, from the effects of blood-poisoning. He

had been prior to his death for many years employed as night janitor and watchman by the plaintiff, *First National Bank of Milwaukee,* his duties being, among other things, to clean inkwells and cuspidors and make rounds of the building. His hours of duty were from 6 p. m. until morning. On Sunday, March 29, 1914, he left home in good health and condition, uninjured, and went to the bank. About 9 o'clock that evening he entered a room of the bank in which Schrantz, one of the employees of the bank, was working, sucking his thumb, and stated that he had scratched or pricked it. Later in the evening while playing cards with one Ballering he stated that he had just scratched his thumb while cleaning cuspidors; that he thought there was a pin in the towel he was using. On Wednesday following he complained to his wife of pain in his thumb and stated to her that he had pricked it, and found out afterwards that there was a pin in the towel he was wiping brass cuspidors with. Thursday the thumb grew worse; a physician was called and Patch was taken to the hospital; the thumb was opened and found to be badly infected. Patch died April 9th from general sepsis, and a doctor testified that the port of entry of the infection was the left thumb.

On May 15th plaintiff, through its agents, filed its report of the accident with the *Industrial Commission.* On this report the following answers were given to certain of the questions under the heading "Machine or Thing Causing Injury:"

"23. What was it? Pin or sharp part of cuspidor.

"26. Part causing the accident? Point.

"31. How did the accident occur? Tip of left thumb punctured while cleaning cuspidor, presumably by pin or some sharp substance unknown in towel or cloth used in polishing."

The following errors are assigned: (1) That the court erred in finding that the statement of the deceased that he had

scratched or pricked his thumb at the time and that he was sucking it to cleanse it was part of the *res gestæ*. (2) The court erred in finding that there was evidence to support the finding that deceased was injured while engaged in performing services growing out of and incident to his employment. (3) The court erred in affirming the award of the *Commission*.

For the appellant there was a brief by *Quarles, Spence & Quarles,* attorneys, and *Mackey Wells,* of counsel, and oral argument by *Mr. Wells.*

For the respondent *Industrial Commission* there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

For the respondent *Patch* there was a brief by *Doerfler, Green & Bender,* attorneys, and *Walter H. Bender,* of counsel, and oral argument by *Walter H. Bender* and *H. E. Kjorstad.*

KERWIN, J. It seems unnecessary to repeat the rule so often stated by this court that if there is any basis in the evidence for the findings of the *Industrial Commission* they will not be disturbed by the court. *Hoenig v. Industrial Comm.* 159 Wis. 646, 150 N. W. 996; *Milwaukee C. & G. Co. v. Industrial Comm.* 160 Wis. 247, 151 N. W. 245; *Milwaukee W. F. Co. v. Industrial Comm.* 159 Wis. 635, 150 N. W. 998; *Eagle C. Co. v. Nowak, ante,* p. 446, 154 N. W. 636; *Heileman B. Co. v. Shaw, ante,* p. 443, 154 N. W. 631.

The *Industrial Commission* acting as an administrative board is not held to the same strict rule with respect to rulings on the admission of evidence as courts of law. *Chicago & N. W. R. Co. v. Railroad Comm.* 156 Wis. 47, 145 N. W. 216, 974; *Borgnis v. Falk Co.* 147 Wis. 327, 133 N. W. 209.

The admission of incompetent evidence will not operate to reverse the award if there be any basis in the competent evidence to support it. *Andrzejewski v. Northwestern F. Co.*

158 Wis. 170, 148 N. W. 37; *Chicago & N. W. R. Co. v. Railroad Comm., supra; Borgnis v. Falk Co., supra; Milwaukee C. & G. Co. v. Industrial Comm., supra; Milwaukee W. F. Co. v. Industrial Comm., supra.* It is insisted that the evidence of Schrantz to the effect that at about 9 o'clock deceased entered the room where he was working, sucking his thumb, and stated that he had pricked it, was not competent evidence as part of the *res gestæ.*

Deceased was at the bank on duty on the night in question. He appeared before Schrantz sucking his thumb and made the statement that he had pricked it. It also appears from the evidence that it was his custom to suck the part injured immediately upon receiving an injury, and that he was in perfect condition when he entered the bank that evening.

We think the evidence of Schrantz was competent as part of the *res gestæ. Andrzejewski v. Northwestern F. Co.* 158 Wis. 170, 148 N. W. 37; *Dixon v. Russell,* 156 Wis. 161, 145 N. W. 761; *Andrews v. U. S. C. Co.* 154 Wis. 82, 142 N. W. 487; *Zoesch v. Flambeau P. Co.* 134 Wis. 270, 114 N. W. 485.

Whether later statements made were competent we need not and do not decide.

The *Commission* refused to consider the report of the accident made by the employer, the material part of which is set out in the statement of facts. We think, independently of this report, there was ample competent evidence to support the award. We also think the report was competent *prima facie* evidence of the facts stated, subject of course to be explained or contradicted. True, in the instant case the report was made by the agent of the employer, but it appears that the agent was authorized to make it on behalf of the principal, and the principal was therefore bound by the acts of the agent. The supreme court of Michigan has held that such reports are admissible. *Reck v. Whittlesberger,* 181 Mich. 463, 148 N. W. 247, 249. See, also, on this point,

Seaboard A. L. R. Co. v. Florida, 203 U. S. 261, 27 Sup. Ct. 109; *Chicago & N. W. R. Co. v. Railroad Comm.* 156 Wis. 47, 145 N. W. 216, 974.

All the competent evidence in the instant case tends strongly to show that the deceased received the injury which caused his death on the night in question while in the employ of the bank and performing services growing out of and incidental to his employment.

We hold that there is ample evidence to support the award of the *Industrial Commission,* therefore the judgment below must be affirmed.

This case was ably presented on both sides in this court. Counsel for the *Industrial Commission* furnished us with a brief of twenty pages covering the material questions in the case. Counsel for respondent *Jennah Patch* also presented a very able and exhaustive brief of seventy-two pages. This brief seems unnecessarily long, therefore the court is of opinion that costs should be taxed for only twenty pages of brief of respondent *Jennah Patch.*

By the Court.—The judgment is affirmed.

ARMSTRONG, Respondent, vs. INDUSTRIAL COMMISSION and another, Appellants.

October 29—November 16, 1915.

Workmen's compensation: Who are dependent: Void marriage: "Member of the family:" Statute construed.

Compensation for the death of an employee cannot be recovered by a woman who was living with him in good faith as his wife but whose supposed marriage with him was void because it took place within a year after his divorce from a former wife. In such a case she was not a "member of the family of the deceased" within the meaning of sub. 4, sec. 2394—10, Stats., that statute being intended to cover legitimate and not illicit ties; and it is not material that she may have been dependent on him for her support.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

For the appellant *Industrial Commission* there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

For the appellant *Wausau Street Railroad Company* there was a brief by *Brown, Pradt & Genrich,* and oral argument by *L. A. Pradt.*

For the respondent there was a brief by *Smith & Leicht,* and oral argument by *George J. Leicht.*

BARNES, J. This action arises out of the accidental death of Hallie R. Armstrong while in the employ of the *Wausau Street Railroad Company* and a claim for recovery made by the plaintiff under the Workmen's Compensation Act, the employer and employee being subject to the terms of that act. The *Industrial Commission* denied compensation. The circuit court reversed this decision and awarded the plaintiff judgment, and defendants appeal.

The plaintiff and deceased were living together as husband and wife at and prior to the time of his death. A marriage ceremony had in form been gone through with, but the deceased at the time was incompetent to contract marriage because he had a wife or former wife from whom he had not been divorced one year. The plaintiff was not aware of the impediment and believed that she was lawfully married.

Sub. 4 of sec. 2394—10, Stats., provides: "No person shall be considered a dependent unless a member of the family of the deceased employee, or one who bears to him the relation of husband or widow, or lineal descendant, or ancestor, or brother, or sister."

It is conceded that the alleged marriage was void and that the plaintiff was not the wife of deceased. The sole question involved is: Was she "a member of the family of the deceased" within the meaning of the statute quoted? We

think the question is answered in the negative by the case of *Severa v. Beranak,* 138 Wis. 144, 119 N. W. 814. However innocent the plaintiff may have been, in law her relation with the deceased was an illicit one, and we think it would be neither good law nor good public policy to hold that such a relation established a family relation. It is probably true that a person not a wife or blood relation may be a member of a man's family. What we hold is, that living with a man as his wife, where there is no marriage, does not create a family relation within the meaning of the statute. We think it was intended to cover legitimate and not illicit ties. It is not material that plaintiff may have been dependent on the deceased for her support, because she is not entitled to recover unless she was a member of his family, and cases holding that a woman living in adulterous intercourse with a man may be dependent on him for support are not in point.

By the Court.—Judgment reversed, and cause remanded with directions to dismiss the complaint.

BRANDEL, Plaintiff in error, vs. THE STATE, Defendant in error.

October 29—November 16, 1915.

Abandonment of wife and child: Failure to support: Statute construed: "Necessitous circumstances."

1. An able-bodied man of presumably some business ability, in good health, who contributed only $12 during seventeen months to the support of his wife and child is *held* not to have contributed to the extent of his ability.
2. A wife is in necessitous circumstances, within the meaning of sec. 4587*c*, Stats., when she does not have property or money available for such necessities or ordinary comforts of life as her husband can reasonably furnish, even though she has the clothing, furniture, and ornaments usually owned by a woman in her station in life or receives aid from others.

ERROR to review a judgment of the municipal court of Milwaukee county: A. C. BACKUS, Judge. *Affirmed.*

Plaintiff in error was on March 6, 1915, convicted of abandonment of his wife and infant child under sec. 4587*c*, Stats. 1913, and duly sentenced. So far as applicable to this case sec. 4587*c* reads:

"Any person who shall, without just cause, desert or wilfully neglect or refuse to provide for the support and maintenance of his wife . . . his or her legitimate or illegitimate minor child or children under the age of sixteen years in destitute or necessitous circumstances, shall be guilty of a crime. . . ."

It appears from the evidence that plaintiff in error and his wife were married about seven years prior to his conviction; that as a result of such marriage a girl was born, and that in October, 1913, he left his wife and child about a year old without any fault on their part and has ever since refused to return to them. It further appears that after he left her she received the net sum of about $35 out of the shoe business he had been engaged in; that he sent her four three-dollar money orders at different times; that she had her engagement ring and other jewelry of the value of about $300 and a piano of the same value purchased with money borrowed from her father, besides the household furniture. During all the time of desertion, covering a period of about seventeen months, plaintiff in error was an able-bodied man in good health. He had previously been in the shoe business in Milwaukee, and it is a fair inference from the testimony that he was capable of filling business positions as well as performing common labor. Neither husband nor wife had any estate except the property mentioned and their personal belongings. A jury was waived and the case was tried to the court with the result stated.

For the plaintiff in error the cause was submitted on the brief of *Bohmrich & Gabel.*

For the defendant in error there was a brief by the *Attorney General, Winfred C. Zabel,* district attorney of Milwaukee county, and *Andrew Gilbertson,* assistant district attorney, and oral argument by *Mr. Gilbertson.*

VINJE, J. Two contentions are made by the plaintiff in error. The first is that he contributed to the support of his wife and child to the extent of his ability, and the second is that they were not in "destitute or necessitous circumstances," within the meaning of the statute, because of the property they had and the support given them by his father-in-law, with whom they made their home, and by reason of the fact that his mother had from time to time contributed some articles of clothing to the wife and child. The first contention is scarcely worthy of notice. An able-bodied man of presumably some business ability, in good health, ought to be able to contribute to the support of his wife and child more than $12 in seventeen months.

The second contention is not so obviously untenable. If the statute means that a wife is not in "destitute or necessitous circumstances" so long as she has any property she can dispose of, or so long as others by way of charity help her, then it might reasonably be claimed that the conviction was erroneous. But the statute can be given no such strict and narrow meaning. It was enacted for the very purpose of compelling a husband to support his wife when of sufficient ability to do so, to the end that that burden should not fall on other relatives or friends or on the county. In measuring the support owing to a wife under the statute due regard should be had to the station in life occupied by her, and what the husband can reasonably contribute out of property already acquired or out of his earnings, or both.

Neither does the statute contemplate that a wife must strip herself of all ornaments, such as her engagement ring and other jewelry of small value or of her piano, and much less of necessary household furniture, before she can be con-

sidered in necessitous circumstances. She is entitled to live decently and in a fair degree of comfort if her husband can reasonably so maintain her. He cannot compel her to descend to the lowest scale of mere human existence. A wife is in necessitous circumstances, within the meaning of the statute, when she does not have property or money available for such necessities or ordinary comforts of life as her husband can reasonably furnish, even though she has the clothing, furniture, and ornaments usually owned by a woman in her station in life or receives aid from others. Should it be deemed that this humane construction of the statute needs the support of legal authority it may be found in the case of *Waller v. State* (90 Kan. 829, 136 Pac. 215) 49 L. R. A. N. S. 588, and in the numerous authorities cited in the note at pages 594 *et seq.*

By the Court.—Judgment affirmed.

JOHN E. DEWOLF COMPANY, Respondent, vs. HARVEY and another, imp., Appellants.

October 28—November 16, 1915.

Real-estate brokers: Commissions: Sale on terms other than those proposed: Right to recover quantum meruit: *Evidence: Competency: Offers of settlement: Sufficiency: Questions for jury: Special verdict: Discretion: Instructions to jury: Contracts: Mutuality: Appeal: Harmless errors.*

1. **Conversations showing offers made before suit in furtherance of an attempted settlement are not admissible in evidence against the party making the offers.**
2. **The admission of such a conversation in evidence in an action by a real-estate broker to recover an agreed commission was not prejudicial to defendants who, although they denied liability on express contract, admitted that they were liable on *quantum meruit*,—the offer being consistent with such admission and tending to support defendants' contention rather than that of the plaintiff.**

3. Defendants having agreed that if plaintiff would procure a purchaser and consummate a sale of land upon specified terms they would pay a certain commission and would also pay such sum as plaintiff might incur for attorneys' fees not exceeding $2,000, and plaintiff having procured a corporation to purchase the property, but upon terms differing from those specified, evidence that defendants paid a law firm $1,500 for services in examining abstracts and drawing the papers necessary to complete the transaction does not show that defendants accepted the sale as a performance of the agreement on plaintiff's part, it not appearing that the attorneys' fees which defendants therein agreed to pay were for services of that character.
4. From the fact, however, that defendants accepted the offer of the purchaser procured by plaintiff, together with evidence as to a conversation between the parties prior to such acceptance, the jury might reasonably infer that defendants accepted the offer as a satisfactory substitute for the terms proposed by them and as a fulfilment of the agreement on plaintiff's part.
5. Where an issue of fact is squarely raised by the pleadings and there is a request for the submission of a question covering such issue in the special verdict, it is, generally speaking, prejudicial error to refuse to submit such question; but where the proposed question does not cover facts specially pleaded a proper instruction covering the matter is a sufficient substitute therefor.
6. Thus, where a real-estate broker sued for an agreed commission on the sale of land and defendants claimed that the sale was not made in accordance with the terms of the agreement, it was not error to refuse to submit a proposed question as to whether the conduct of the parties showed that it was their intention that defendants should pay to plaintiff the reasonable value of the services rendered, the court having covered that matter in his charge.
7. Where a broker upon receiving a proposal to pay him a commission for procuring a purchaser for property on certain terms proceeded to do the work which it was contemplated would be done by him, such action on his part constituted an acceptance and gave mutuality to the contract.
8. Where the charge was sufficiently full and complete and fairly advised the jury as to the law by which they should be governed, there was no error in refusing to give requested instructions, even though they were correct as abstract propositions of law.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

Plaintiff brings this action to recover from the defendants commission alleged to be due it as a broker under the terms of certain written proposals dated March 1, 1913, which are as follows:

"*John E. DeWolf Company,* Milwaukee.

"Gentlemen: In consideration that you, on or before March 10, 1913, procure some person or corporation to purchase from the present owners the following described property: [here follows description] for the sum of four hundred and thirty-five thousand dollars ($435,000), to be paid in cash, or by permitting the present mortgage of seventy thousand dollars ($70,000) to remain on the premises, and the balance in cash, I to have the option to take said mortgage up or let it run as I may elect:

"I agree that either I, or some corporation that I shall organize for the purpose, will take from the purchaser or purchasers of said premises, so procured by you, when they have obtained title as aforesaid, a ninety-nine-year lease of the same, running from the date of the delivery of the deed, which lease shall contain the following conditions among others:

"The rental to be paid under such lease shall be six per cent. (6 %) upon the purchase price for the first two (2) years of the term, and thereafter the rental shall be five and one-half per cent. (5½ %) per annum upon the purchase price for the remainder of the term, all rent to be payable quarterly, in advance;

"And in addition, the lessee shall pay all taxes, assessments and insurance premiums, of every nature, when due.

"The lease shall obligate the lessee to erect upon the property a modern fire-proof commercial building, costing not less than three hundred thousand dollars ($300,000). The building to be commenced within five (5) years from the date of the delivery of the deed, and to be completed within seven (7) years of the date of the delivery of the deed.

"The obligation to build the building shall be secured by the bond of a solvent surety company, authorized to do business in Wisconsin, acceptable to the lessor, in the amount of at least two hundred thousand dollars ($200,000); and further, by the signature, by way of guaranty, of some individual or individuals who severally or jointly can qualify to the

satisfaction of the lessor for a financial responsibility of two hundred thousand dollars ($200,000) over and above all their present obligations.

"The said lease is to contain a provision under which the lessee may repurchase said property at any time before the expiration of ten (10) years after the date of the lease, and upon six (6) months' notice, for the sum of four hundred and thirty-five thousand dollars ($435,000), plus five per cent. (5 %) of said sum, and after ten years (10) from the date of the lease and before fifteen (15) years from the date of the lease, for the sum of four hundred and thirty-five thousand dollars ($435,000), plus seven and one-half per cent. (7½ %) of said sum, upon six months' notice.

"The lease shall contain other provisions common to ninety-nine-year leases, and shall accord, in so far as the terms thereof shall be applicable, in form, to the ninety-nine-year lease now in effect upon the Plankinton House property in the same block.

"The title which is procured to this property must be a title in fee and free from incumbrances, except as to the mortgage hereinbefore recited, and to the rights of persons in possession under present leases, the terms and nature of which I am informed of.

"Dated Milwaukee, Wisconsin, March 1, 1913.

"(Signed) GEORGE A. HARVEY. (Seal.)"

"*John E. DeWolf Company,* Milwaukee.

"Gentlemen: In consideration that you consummate all matters and transactions which will result in the agreement which I have with you, of which a copy is annexed, being fully carried out, I will, upon the completion thereof, pay you the sum of twenty-five thousand dollars ($25,000), to be in full for all your services, commissions and expenses with this exception: I will pay such sum as you may actually incur for attorneys' fees not exceeding two thousand dollars ($2,000) as a part of your expenses.

"I will also take care of the payment of any commission that Carl Remeeus may be entitled to.

"Dated Milwaukee, Wisconsin, March 1, 1913.

"(Signed) GEORGE A. HARVEY."

The amended complaint alleges that plaintiff, after delivery to it of said instruments, procured a corporation, the

Ticonic Investment Company, to enter into negotiations with the defendants for the purchase of the property in question; that as a result of such negotiations the Ticonic Investment Company submitted to the defendants, through plaintiff, a proposal modifying in certain particulars the terms contained in said proposals of March 1st, and that defendants accepted such modification without further notice to plaintiff and without objections thereto, and pursuant thereto the Ticonic Investment Company purchased the lands and paid the owners therefor and gave to the defendants a ninety-nine-year lease which they accepted in accordance with and for the rentals specified in said instruments, with certain modifications which defendants agreed upon without notice to plaintiff, and that defendants thereafter accepted the consummation and carrying out by said Ticonic Investment Company of its said proposal in a manner agreeable to the defendants as a performance of plaintiff's agreement with said defendants; that no part of the commission payable under said instruments has been paid, except that defendants have paid attorneys' fees which were incurred and have paid all commissions, if any there were, payable to Carl Remeeus. The material difference between the agreement proposed and the one consummated will be stated in the opinion.

The defendant *George A. Harvey* answered in his own behalf and in behalf of the copartnership Harvey Brothers, admitting that plaintiff procured a corporation to purchase the land described in said instruments, but alleged that the procuring of the purchaser and the making of such purchase was not in pursuance of or in accordance with said proposals. The defendant *Somers* answered separately, the material allegations of his answer being the same as those contained in the answer of the defendant *Harvey*. A single question was submitted to the jury, which, with the answer thereto, is as follows:

"Was the arrangement as finally completed and carried out by the Ticonic Investment Company taken and considered by

the parties to this action as a fulfilment of the contract Exhibit 4 in evidence? *A.* Yes."

From judgment entered on such verdict in favor of plaintiff and against the defendants this appeal is taken.

For the appellants there was a brief by *Miller, Mack & Fairchild,* and oral argument by *James B. Blake* and *E. S. Mack.*

Lawrence A. Olwell, for the respondent.

BARNES, J. It is not now asserted that the proposition (which for convenience will hereafter be referred to as a contract) submitted by *Harvey* to the plaintiff was literally complied with by the latter, although the original complaint was framed on that theory. The claim that there was a substantial performance was made by an amended complaint, but was not submitted to the jury, and the sole issue submitted for determination was whether or not the arrangement as made and carried out by the Ticonic Investment Company was taken and considered by the parties to this action as a fulfilment of the contract between plaintiff and defendants, it being conceded that the contract signed by *Harvey* was made in behalf of his codefendants as well as himself.

The fact that the counter offer of the Ticonic Investment Company was accepted, taken in connection with three items of evidence, is relied on by respondent to support the verdict returned. One of these items of evidence related to a conversation in the office of Carey, Upham & Black, another to a conversation in the Plankinton House, and the third to a payment of attorneys' fees by defendants to Carey, Upham & Black.

The general contentions of the appellants are: (1) The Plankinton House conversation was incompetent. (2) Excluding the conversation, the evidence is insufficient to support the finding of the jury. (3) If the evidence pertaining to this conversation was properly received, still the verdict is

without support in the evidence. (4) The court erred in refusing to submit a question to the jury asking whether or not there was an understanding between the parties that defendants would pay plaintiff a reasonable compensation for its services instead of the sum named in the contract. (5) That the question submitted did not fairly state the issue, if there was any. (6) That the court erred in instructing the jury. (7) That the court erred in refusing to give certain requested instructions.

In considering the main question in the case (*i. e.* the refusal to grant a nonsuit or direct a verdict) the evidence most favorable to the plaintiff need only be considered where there is a conflict, the jury having found in plaintiff's favor.

It must be conceded that the question whether the evidence sustains the verdict is a close one, so close that, if incompetent evidence was received which was prejudicial to the defendants, a new trial should be ordered unless we are satisfied that the competent evidence offered was insufficient to support the verdict, in which contingency the complaint should be dismissed.

The parties are not entirely agreed as to what transpired at the Plankinton House talk, but the variance is not very material. In substance the defendants wanted to know what arrangement could be made about commission provided they concluded to go on with the deal. Plaintiff's officers asked them what they had to offer, whereupon they said they would pay $10,000. This the officers of plaintiff refused to consider, saying in effect that they would insist that the entire amount be paid. Defendants said they would not pay $25,000; that they would drop the deal first. To this plaintiff's officers replied that they had better drop it then. DeWolf insisted that plaintiff had performed its contract, while *Harvey* insisted that it had not.

The position of defendants is that this talk related to a compromise settlement and that conversations showing offers

made in furtherance of attempted settlements cannot be received in evidence. This question would seem to be ruled in defendants' favor by repeated decisions of this court: *State Bank v. Dutton,* 11 Wis. 371; *Richards v. Noyes,* 44 Wis. 609; *Jewett v. Fink,* 47 Wis. 446, 455, 2 N. W. 1124; *Gibbon v. Hughes,* 76 Wis. 409, 411, 45 N. W. 538; *Taylor v. Tigerton L. Co.* 134 Wis. 24, 29, 114 N. W. 122; *Tobin v. Nichols,* 156 Wis. 235, 237, 145 N. W. 659.

However, we may not reverse unless the error was prejudicial. If harm resulted to the defendants, it must be because the offer might be construed as an admission of liability on the contract to the extent of $10,000. It is because settlements are favored in the law, and because parties would refrain from making offers if these offers were to be used against them as admissions, that the rule referred to has been adopted.

If the only question in the case were liability or nonliability under the contract, it might be difficult to say that this evidence was not prejudicial to the defendants. But this was not the only question in the case. The defendants, through the efforts of the plaintiff, had secured an investment of $400,000 upon terms which presumably were highly advantageous to them, although not as much so as those recited in the written contract set forth in the statement of facts. Whether acting from motives of fair dealing or of expediency, they did not take the position that they were freed from all liability. On the contrary, they insisted that they were liable for the reasonable value of the services rendered. They insisted that the question of their liability on *quantum meruit* should be submitted to the jury by a specific question covering this issue. The court charged the jury that if it appeared "that it was the intention of the defendants to pay and the plaintiff merely to accept merely what the services were reasonably worth, and not according to the terms of the contract, then you should answer the question in the nega-

tive." In defendants' brief it is said that they "maintained throughout the trial that the conduct of the parties, after it became apparent that plaintiff could not produce a purchaser in accordance with the terms of the original proposal, evidenced an understanding that the plaintiff was to be paid the reasonable value of its services for such service as it actually rendered in procuring a purchaser, but not the commission offered in the original proposal."

With defendants taking the position that they were not liable on contract but were on *quantum meruit,* it is difficult to see wherein they were prejudiced by the evidence of the Plankinton House conversation. They emphatically denied liability on the contract, but offered to pay a much lesser sum. This offer was consistent with an admission of liability for the reasonable value of the services. Plaintiff's officers admitted a refusal to pay the contract price. It seems to us that this evidence was beneficial to the defendants as supporting their *quantum meruit* theory, and did not tend to support the claim of the plaintiff that defendants had agreed to pay the sum named in the contract for the work actually done. If this be correct, then no error was committed in receiving the evidence that could be considered prejudicial to the defendants. Under the circumstances shown, we think there was nothing about this offer of settlement that was helpful to the plaintiff's case, and that it must stand or fall on the other testimony and the inferences that might properly be drawn therefrom.

Before discussing the other two items of evidence referred to, it might be well to direct attention to some other facts in the case. The defendants had an option on the Mariner property for $300,000, and actually bought it for $290,000. The original proposition made to the plaintiff company called for an advance of $435,000 on this property, which, however, was still further secured by a contract to erect a $300,000 building on the premises within seven years, on which de-

fendants were to take a ninety-nine-year lease. This contract was in turn to be secured by a surety bond guaranteeing that the building would be erected, and conditioned in the sum of $200,000. If the original proposition was carried out, the defendants would have the sum of $435,000 at once available for purchasing the Mariner property and commencing work on the building. Under the proposition of the Ticonic Company the sum of $285,000 only was immediately available. The remaining $150,000 was to be applied in payment of the last items of cost of the building to be erected. Because of this change, the amount of the surety bond was reduced to $100,000. If the first proposition had been carried out, the defendants would have been relieved of the necessity of advancing $5,000 of their own money to buy the Mariner lot, would have had cash on hand to pay the plaintiff's commission without drawing on their own funds, and would have had $120,000 left with which to start building operations. In lieu of this they were to be paid $150,000 at a later date to apply on the last cost of the building, and were relieved of the necessity of furnishing a $200,000 bond, one for one half of that sum only being required, on which, however, there was a saving of $1,000 a year in premiums. These are the substantial differences between the proposition originally made by defendants and that finally made by the Ticonic Company and accepted by defendants. The importance of the change insisted on by the Ticonic Company would depend largely on the ability of the defendants to provide ready money from other sources to pay the $30,000 referred to and to provide the initial sum requisite to carry on building operations. Although the contract sued upon was dated March 1, 1913, and the deal was completed a short time thereafter, there had been correspondence in reference to the proposed deal between plaintiff and *Harvey* as early as November, 1912, but pending a decision of the case of *Upham v. Plankinton,* 152 Wis. 275, 140 N. W. 5, defendants declined to bind themselves by making an unequivocal proposition.

In the $25,000 offer made to plaintiff it was stated: "I will pay such sum as you may actually incur for attorneys' fees not exceeding $2,000 as a part of your expenses." After the deal was consummated defendants paid the law firm of Carey, Upham & Black $1,500 for legal services. The plaintiff argues that this sum was paid in pursuance of the above offer and strongly tended to show acceptance of the Ticonic Company's proposition as a compliance with the contract in suit. The evidence is rather meager as to why the money in question was paid. Mr. Richardson, of the firm of Carey, Upham & Black, gave the only evidence bearing on the subject. He testified:

"At the time of this transaction the firm name of our present organization was Carey, Upham & Black, the legal end of it. I was familiar at that time with the charges which the firm made in relation to or on account of attorneys' services rendered in connection with this Mariner transaction and I know what the charges of the firm for those legal services . . . were."

The amount was stated to be $1,500, which sum was paid by *Mr. Harvey*. Presumably the services or some of them were for examining abstracts and drawing the contract, lease, surety bond, and other papers necessary to complete the transaction in reference to the Mariner property. This is a fair enough inference from the testimony offered. The evidence is of doubtful importance because of failure to show that the attorneys' fees which *Harvey* agreed to pay plaintiff were for services of this character. It does not satisfactorily appear that had the Ticonic Investment Company been willing to accept the terms of the *Harvey* proposition the plaintiff would have been liable for attorneys' fees for services rendered in drafting the necessary documents to finally consummate the deal.

The finding of the jury must rest almost wholly on the conversation in Upham's office and on what was subsequently done. The jury might believe from the evidence that after

Mr. Upham stated just what he was willing to do, *Harvey* said to plaintiff's officers: "This was entirely different from my understanding, and my first understanding of any change, but I will attempt to fill as per the terms laid down. . . . I will have to get in touch with Cleveland, and we will try to fill on this. . . . You fellows [plaintiff's officers] will have to help me out with a little money." The Upham proposition was accepted and the deal was consummated without plaintiff having been requested to furnish any money to aid in carrying it through. The plaintiff brought the defendants and the Ticonic Company together. Defendants were unable to get just what they wanted or just what they offered to pay $25,000 for, but they were offered something that might suit their purposes almost if not quite as well. They were getting all the money needed to buy the Mariner property except $5,000, and were to get the remaining $150,000 to pay on the building, and they were saving $1,000 a year on the cost of a surety bond. They might of course refuse to accept the Ticonic offer and escape liability to the plaintiff. They might also treat it as a satisfactory substitute for their own proposition. They elected to accept, and we think the jury could reasonably infer from such acceptance, coupled with the testimony as to what transpired between the parties in the Carey, Upham & Black office, that the defendants accepted the contract offered as a fulfilment of the contract which plaintiff undertook to perform.

The defendants requested the court to submit to the jury the question whether the conduct of the parties showed that it was their intention that defendants should pay to the plaintiff the reasonable value of the services rendered by the plaintiff. The court refused to submit such a question to the jury, but, as before stated, charged the jury that if they found the intention of the parties was that plaintiff should be paid the reasonable value of its services, then the question submitted should be answered in the negative. It is the contention of

the appellants that the requested question presented an issuable fact upon which they were entitled to have a specific finding by the jury; that it was error to refuse to submit the question, and that such error was not cured by the instruction given.

It would, we think, have been more fair to the defendants to have submitted the question, because it would have presented the issue more forcibly to the jury than it was presented. It was discretionary with the trial judge, however, to cover the matter with his charge, rather than by a question in the special verdict. This court has said in many cases that where some issuable fact is squarely raised by the pleadings and a question is requested covering such issue, it is error to refuse to submit such question, and, generally speaking, prejudicial error. The recent cases in this court dealing with the subject are reviewed in *Wawrzyniakowski v. Hoffman & Billings M. Co.* 146 Wis. 153, 131 N. W. 429. This decision was subsequently followed in the case of *Sadowski v. Thomas F. Co.* 157 Wis. 443, 146 N. W. 770.

Where, however, the proposed question does not cover facts specially pleaded, an instruction such as was here given is a sufficient substitute therefor. *Vogel v. Herzfeld-Phillipson Co.* 148 Wis. 573, 579, 134 N. W. 141. See, also, *Steber v. C. & N. W. R. Co.* 139 Wis. 10, 120 N. W. 502. There was no such issue raised by the complaint or by the answer in this case as defendants sought to have submitted to the jury by the proposed question, and we therefore hold that it was not error to refuse to submit the question.

The question is raised that the alleged contract between the plaintiff and the defendants was unilateral, and, not having been performed by the plaintiff, there could be no recovery thereon. The testimony showed that after receiving the defendants' proposition the plaintiff proceeded to secure some person who would purchase the Mariner property under the conditions set forth in the proposition. It proceeded to do

the work which it was contemplated would be done by it, and such action on its part constituted an acceptance and made the contract mutual thereafter. *Schoenmann v. Whitt,* 136 Wis. 332, 117 N. W. 851, and cases cited.

A number of exceptions were taken to the refusal of the court to charge the jury as requested by the defendants, and some exceptions were also taken to the charge as given. The requests to charge are twenty-five in number and occupy more than twelve printed pages. A special verdict consisting of only one question was submitted. The court properly charged the jury on the burden of proof, and, further, that there must be a meeting of the minds of the parties evincing an intention on the part of both that the proposition of the Ticonic Investment Company should be considered as a compliance with the terms of the plaintiff's proposition, in order to warrant the jury in answering the question in the affirmative. As before stated, the jury was further instructed that if it was the understanding of the parties that plaintiff was to be paid the reasonable value of its services instead of the price stipulated in the contract, the question submitted should be answered in the negative. The charge of the court was quite full, and fairly advised the jury as to the law by which it should be governed in answering the question. A number of the requested instructions are correct enough as abstract propositions of law, but we think there was no error in the charge as given and that it was sufficiently full and complete and that therefore no error was committed by refusing to give such of the requested instructions as were refused. It would serve no useful purpose to discuss these assignments of error in detail.

By the Court.—Judgment affirmed.

FOTH, by guardian *ad litem,* Respondent, vs. MACOMBER & WHYTE ROPE COMPANY, Appellant.

September 16—December 7, 1915.

Workmen's compensation: Statute construed: What minors are "employees."

In sub. (2), sec. 2394—7, Stats., the words "minors who are legally permitted to work under the laws of this state," used in defining the term "employee" in the Workmen's Compensation Act, are not to be restricted so as to apply only to minors permitted to be employed in the precise work in which the accidental injury in question was sustained, but are to be given a broad, comprehensive meaning, so as to include all minors who are permitted, under the laws of the state, to work at any gainful occupation under any circumstances.

APPEAL from a judgment of the circuit court for Kenosha county: E. B. BELDEN, Circuit Judge. *Reversed.*

Action to recover for a personal injury to *Clarence Foth,* a minor.

While in the employ of the defendant and doing work which he was prohibited by statute from being employed to perform plaintiff, *Clarence Foth,* was severely injured, the flesh and skin being considerably torn from his left arm, causing him much pain, wholly incapacitating him from doing manual labor for a considerable length of time and permanently weakening and diminishing the usefulness of the member.

An ordinary action was commenced because plaintiff claimed that, since the injury occurred while he was doing work he was prohibited from being employed to perform, the case was not to be dealt with under the Workmen's Compensation Law. The claim of defendant was that the boy was not employed to do the particular work, but did it of his own accord; that he was guilty of contributory negligence, and that, in any event, the case is within the Workmen's Com-

pensation Law, because the boy was legally permitted to work for hire under the laws of this state, though not to be employed in some particular kinds of work, including that which he was engaged in when injured.

The jury found the facts in favor of plaintiff and fixed the damages at $1,500. The court sustained the plaintiff's claim as regards whether the case is within the scope of the Workmen's Compensation Law. Judgment was rendered accordingly.

For the appellant there was a brief by *Brown, Pradt & Genrich,* attorneys, and *Cavanagh, Barnes & Cavanagh,* of counsel, and oral argument by *R. P. Cavanagh* and *C. D. Barnes.*

For the respondent the cause was submitted on a brief signed by *Lehr, Kiefer & Reitman,* attorneys, and *J. Elmer Lehr,* of counsel.

The following opinion was filed October 5, 1915:

MARSHALL, J. The verdict of the jury is fairly sustained by the evidence. That is all which need be said on that branch of the case. If it were not for the question of jurisdiction, there might well be an affirmance without an opinion.

The question of jurisdiction turns on the meaning of the words, "minors who are legally permitted to work under the laws of the state," in sub. (2), sec. 2394—7, Stats., defining, in part, the meaning of the word "employee" in the Workmen's Compensation Law, so as to render plain the scope of the legislative purpose as to the class of persons it was intended to include. Such sub. (2) is as follows:

"Every person in the service of another under any contract of hire, express or implied, oral or written, including aliens, *and also including minors who are legally permitted to work under the laws of the state* (who, for the purposes of section 2394—8, shall be considered the same and have the power of contracting as adult employees)." . . .

Should the particularly quoted words have a very restrictive construction so as to mean, as applied to such an event as the one in question, minors permitted to be employed to do the precise work, or should they have a quite broad, comprehensive meaning, so as to include minors permitted, under the laws of the state, to be employed to do any kind of work? The trial court favored the former.

When the Workmen's Compensation Law was enacted, children of quite tender age were not permitted to work at any gainful occupation; above that age they were divided into several classes. Some were permitted to be employed to work under specified conditions and in specified occupations, and some were expressly prohibited from being employed to do work deemed to be extrahazardous. It was easy for the legislature to perceive that, if in every one of the many situations where the law permits a minor to be employed, subject to particular conditions, whether the particular case is within or without the scope of the Workmen's Compensation Act must turn on its satisfying such conditions, in many instances the benefits of the beneficent plan for dealing with personal injury accidents of industrial life, will not be available. That is important in determining what was intended by the words under consideration. If it was to deal with such incidents with the idea that all accidental personal injury losses of employees received in the course of their service, whether characterized by negligence or not, are, like wages and other elements, a part of the cost of production, and to make such losses compensable as economically, promptly, and certainly as practicable, then we must look at the legislative language from that viewpoint. There is no safer rule for a judicial construction of ambiguous legislative language than that it should be read in the light of the particular situation dealt with, the infirmities to be cured, and the objects sought to be attained.

The time has gone by for extensive, original discussion of the legislative thought in passing the Workmen's Compensation Law, since its broad beneficent purpose is plain and the court has heretofore several times recognized it and construed the act so as to fully effectuate such purpose, so far as practicable. To that extent there can be no doubt the legislature intended to go, and its language should unhesitatingly be so read as to accomplish it. This court substantially thus emphasized that in *Milwaukee v. Miller,* 154 Wis. 652, 144 N. W. 188, speaking of the class of laws of which the Workmen's Compensation Act is a significant type and applying the language thereto: In construing a statute which is referable to the police power and was originated to promote the common welfare supposed to be seriously jeopardized by the infirmities of an existing system, "the conditions giving rise to the law, the faults to be remedied, the aspirations evidently intended to be efficiently embodied in the enactment, and the effects and consequences as regards responding to the prevailing conceptions of the necessities of public welfare," should be considered and the enactment given such broad and liberal meaning as can fairly be read therefrom so far as required to effectively eradicate the mischiefs it was intended to obviate.

This further reason exists why the particular words should have a broad, liberal construction: The legislature exercised particular care to make its purpose unmistakable, going to the extent of specially defining the meaning of significant words, including the word "employee." Had the purpose been to make such word as restrictive as the trial court supposed, it was so easy to have said, "permitted to work under the laws of the state," subject to prescribed conditions and restrictions, the fact that no such restrictive words were used is well nigh conclusive evidence of a purpose to use the words in the sense of, permitted to work under the laws of the state at any gainful occupation under any circumstances.

We reach the conclusion that the legislative purpose was as above indicated, and the words "(who, for the purposes of section 2394—8, shall be considered the same and shall have the power of contracting as adult employees)" were added to render clear that, without prejudice to liability under the penal statutes, any minor who is legally permitted to work at all in a gainful occupation is to be regarded as being competent to contract, as regards subjecting himself to the provisions of the Workmen's Compensation Law, as fully as an adult person.

It follows that the trial court erred in not dismissing the case for want of jurisdiction. Therefore, the judgment must be reversed and the cause remanded for dismissal with costs in favor of defendant.

By the Court.—So ordered.

Upon a motion by the respondent for a rehearing, his counsel contended, *inter alia,* that an injury to a minor employed in violation of law is not "caused by accident," but is the result of the wrongful act or misconduct of the plaintiff, and is therefore not covered by the Compensation Law.

Briefs in support of the motion were also filed by *F. W. Houghton* as a friend of the court, and by the *Attorney General* as *amicus curiæ.* The *Attorney General* argued, among other things, that all minors "are legally permitted to work under the laws of the state" in some occupations, to wit, agricultural pursuits. If, therefore, eligibility to any legal employment is made the criterion of the employee's status, as within or without the Compensation Act, regardless of whether that eligibility be for employment in the work or occupation in which he is engaged at the time of his injury, *then every minor employed is within the act.* But, if that construction obtains, it can only be by wholly disregarding the qualification in the legislative mind when it wrote into the statute the words "who are legally permitted to work

under the laws of the state." By the clause "minors who are legally permitted to work under the laws of the state," the legislature could not have meant minors who are legally permitted to work under the laws of the state at any occupation whatever and at any time, under any circumstances, because that would include all minors. The use of the phrase "under the laws of the state" is significant. Following the words "who are legally permitted to work," it might seem tautology to add "under the laws of the state." The office of this clause, it seems to me, is to constitute a reference by which the conditions and restrictions of the laws of the state relating to the employment of minors are intended to be incorporated in this act.

In opposition there were briefs by appellant's counsel.

The motion was denied, without costs, on December 7, 1915.

Delvaux, by guardian *ad litem,* Appellant, vs. Kewaunee, Green Bay & Western Railway Company, Respondent.

September 18—December 7, 1915.

Railroads: Injury to boy: Catching on train: Negligence: Questions for jury: Changing verdict.

In an action for injuries to a boy who was run over on defendant's track either—as he claimed—after a train had been parted into two sections and he was trying to cross the track in front of the rear section, which he supposed was at rest, or—as defendant claimed—when he attempted to catch a ride on the moving cars before the train was parted, it is *held* that the trial court was not clearly wrong in deciding that the evidence conclusively showed that the injury occurred before the train was parted, and in changing the special verdict accordingly and rendering judgment for defendant on the ground that there was no proof of negligence on its part.

Appeal from a judgment of the circuit court for Brown county: Henry Graass, Circuit Judge. *Affirmed.*

Action to recover for a personal injury. December 4, 1914, *Ernest Delvaux,* a boy a few months over nine years of age, and three other small boys, were playing at a stone pile near defendant's railway tracks in the city of Green Bay, Wisconsin. While so engaged a freight train arrived in the vicinity. At such place such trains were accustomed to be parted into two sections in order to facilitate leaving one section on the west side of Oakland avenue, to be taken care of by the switching crew, and running the other further on, to the depot. To accomplish that and not obstruct Ashland avenue, east of Oakland avenue, it was customary for the engineer to stop his engine before it reached the former and enable the rear brakeman to make the separation at the desired place west of the latter. The understanding was such between the engineer, conductor, and rear brakeman, that the movements usually occurred without using signals, because of the nature of the track and surroundings. The engineer knew, substantially, where to bring his engine to a stand, the rear brakeman where to cut the train, and the engineer about what time to allow for that purpose before starting with the forward section. The cut was usually made by turning the valve on the air line to the brake-control appliance and parting the line, thus setting the brakes on the proposed hind section, and opening the coupling, leaving the forward section free to be moved. On the particular occasion, by some means, *Ernest Delvaux* got in front of moving car wheels so that one crushed his right leg and left foot so part of each member was lost. Some toes were crushed off and found on the track.

The claim of the boy was that the train was parted while moving slowly near where he and the other boys were waiting for an opportunity to cross the track; that after the head section moved away he started to cross supposing that the rear section, as usual, was at rest; that, too late, by due care to discover to the contrary, he tried to escape from the danger but slipped and fell in front of the wheel and was injured. The claim of the defendant was that the boy was in-

jured before the train was parted into two sections, that he and his associates caught on to the side of the moving cars, or tried to do so, and that in movements to that end he got in the way of the car wheel which crushed him. There was very little, if any, believable evidence to corroborate the boy's story that he was injured while trying to cross the track after the train was broken. There was direct evidence from many witnesses that the injury occurred before the train was parted and much evidence to establish facts rendering the story of the boy unworthy of belief.

At the close of the evidence there was a motion for a verdict in defendant's favor upon the ground, among others, that the proofs demonstrated that the injury must have occurred before the train was parted, in which case it was conceded there could not be a recovery, for want of proof of negligence on defendant's part. The motion was denied, and the matter was submitted to the jury, resulting in a special verdict in harmony with the boy's story, and findings in his favor of all facts essential to recovery in his behalf. On motion, the court changed all answers inconsistent with the claim of defendant that the boy was injured before the train was parted, and rendered judgment accordingly.

M. E. Davis, for the appellant.

For the respondent there was a brief by *Greene, Fairchild, North, Parker & McGillan,* and oral argument by *H. O. Fairchild.*

The following opinion was filed October 5, 1915:

MARSHALL, J. While counsel for respondent urge upon our attention some reasons why the judgment should be affirmed, even though the ground the trial judge rested the decision on should seem unsound, the conclusion reached by the majority of the members of the court, renders it unnecessary to consider such reasons.

The sole question, therefore, to be determined is: Was the circuit judge clearly wrong in reaching the conclusion that the evidence so clearly demonstrates that the boy was injured before the train was parted as to render his evidence to the contrary unbelievable?

In view of the superior advantage a trial judge has for deciding whether evidence presents a jury question, and, especially, where the evidence is of the nature of that in this case, it requires a strong case against his conclusion to warrant the appellate tribunal in concluding, not only that he was wrong, but clearly so. Hence the initial decision in such a situation is infrequently disturbed.

Under the rules governing the matter, whether error essential to reversal exists in such a case as this, is often so shadowy as to render the requirement that it must clearly appear, the deciding factor. That, occasionally such a situation results in a disagreement is most natural, and unavoidable, unless there be such willingness to surrender deliberately formed judgment as to endanger the strength of the court. We have been unable to reach a unanimous conclusion here. The majority are constrained by careful study of the case not to condemn the decision complained of, while the minority are constrained to the contrary, all testing the evidence by the same rules of law.

It will not serve any valuable purpose to place on record an opinion discussing the evidence in detail. The trial judge evidently appreciated the legal test to be applied in determining whether the evidence presented a jury question. It seems we cannot do better than to substantially adopt his opinion. It bears satisfactory indications of his having carefully considered the evidence in all its bearings. Moreover, counsel for appellant on the oral argument seemed to be unable to find serious fault with the judge's statements except as to one particular which the judge, evidently, regarded as trifling, under the circumstances.

The opinion was rendered on the motion to change the verdict so as to favor defendant. It was this, in effect:

The facts are fresh in my mind. As I viewed the case before submitting the case to the jury, and as I view it now, there has been no change. Plaintiff's case rests wholly upon the boy's story. He is eleven years old. His is the only testimony as to how the accident occurred. It is not corroborated by a single witness. His father, his aunt, and Joseph Taylor only gave evidence tending to impeach the evidence of the brakeman as to whether trains were uncoupled while moving. So the claim of negligence in this instance rests wholly on the testimony of the boy, eleven years old.

Opposed to the boy's evidence, we have that of the entire train crew of five men; Ernest Maddy, the brakeman, Ryder, the head brakeman, Arens, the fireman, Dingman, the conductor, and Buttrick, the engineer. They all testified, positively, that the train had stopped at the time they were opening the coupling, and that at least two attempts, most of them were positive there were three, were made before the front section was clear and moved away.

Suppose the five men who testified to the contrary of the boy as to the train not stopping are, in a measure, interested; they are corroborated by the evidence of five witnesses, W. H. Tierney, Oscar Gallagher, Patrick Gallagher, E. C. Juley, and C. H. Smith, that while the unbroken train stood there, they found the boy's toes and some blood spots ahead of the rear section. These five witnesses who were not members of the train crew thus testified, to what defendant's counsel denominate a physical fact,—the location of the toes and blood spots. Oscar Gallagher further testified that he was head switchman in the yard; that it was his duty to switch the cars after the engine laid up; that he was on duty that night; that he was just going to work, and that those cars had not been touched by their switch engine since he had left them. Besides, there is the fact that Juley went within twenty-five feet of the boy where he lay on the ground after his injury and the train was yet coupled up.

Further, there were four boys. Plaintiff produced one of them to say how the accident happened. Defendant produced one who did not know anything about the matter. Lawrence Van Husen, the other, was just as positive that the boys

caught on to the train while it was moving as young Delvaux is that the train was uncoupled. Juley, who was called by Maddy and furnished the handkerchief with which to tie the boy's leg, corroborated Maddy. These are the main facts. I may have erred in submitting the case to the jury. I was then firmly of the opinion that the facts were such that the jury could not do otherwise than decide as I have indicated and am disappointed. The plaintiff had the burden of proof. Does the boy's evidence under the circumstances outweigh the testimony of all the other witnesses so as to warrant finding, to a reasonable certainty, in his favor? I think not. Eleven witnesses contradicted him. Five of them, especially as to the blood spots and finding the toes ahead of the rear section. The entire train crew testified that the train had stopped to allow uncoupling. Maddy says the entire train stood there as he called for help while the boy lay on the ground. Juley responded and said the same thing.

The foregoing abridgment of the trial court's opinion seems a fair statement of the case. The majority failed to find any efficient infirmity in it, and so the judgment must be affirmed.

By the Court.—So ordered.

SIEBECKER, KERWIN, and BARNES, JJ., dissent.

A motion for a rehearing was denied, with $25 costs, on December 7, 1915.

SMITH, Appellant, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Respondent.

October 7—December 7, 1915.

Railroads: Injury to person on track in station: Contributory negligence: Headlights: Validity of statute.

1. **An employee of an express company who was struck and injured by a train alleged to have been run into a station at an excessive rate of speed without giving appropriate signals, is *held*, as a matter of law, to have been guilty of contributory negligence upon evidence showing, among other things, that he was familiar with the surroundings and knew that the train was likely to come in soon on the track in question; that the station was well lighted; that he had walked 200 feet beside the track without looking back, and then stepped into the zone of danger when the engine was just behind him.**

[2. **Whether sec. 1809*v*, Stats., relating to locomotive headlights, is unconstitutional, is not decided.]**

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

Action to recover damages for personal injury. Plaintiff, an employee of the American Express Company at defendant's station in the city of Milwaukee, Wisconsin, while in performance of his duty going from his employer's building at such station along and parallel with one of the railway tracks between the same and a fence, the two being seven and one-half feet apart, to a truck which he had previously placed several hundred feet from his starting point, was struck from behind by the pilot of an engine of a belated train and seriously injured. He knew the train was past due and was hurrying to reach his truck, though he said the quick movement was because he was cold. The accident occurred in the nighttime about half-past 1 o'clock. The track along which he was traveling was the left hand one of four parallel tracks, under the covered part of the station.

Plaintiff claimed that defendant was actionably negligent in running its train into the station at an excessive rate of

speed without giving appropriate signals, particularly without ringing the engine bell. On the trial there was a further claim that defendant was liable because the accident was, in part, at least, caused by failure to comply with sec. 1809*v*, Stats., as regards the character of engine headlight.

The evidence established the situation aforesaid and the following: Plaintiff was familiar with his surroundings though he had worked but a brief time in the particular situation. He knew that a train was liable to soon come in on the track along which he was walking. The station was well lighted with nine electric arc lights, and the lights had been set for the arrival of the expected train. At or about the time plaintiff started from the express building, he looked around to see if any coming train was in sight. After going a short distance further he looked around again. He then proceeded over 200 feet and until struck without again looking around. Up to about the instant of the collision, he walked near the fence where he was out of danger. He did so knowing that such was the safe way. He was so doing when the train reached a point within about forty or fifty feet of him and the engineer had set the brakes for the stop. The fireman observed him in a place of safety and assumed that he knew of the approach of the train. It was making the usual noise of a moving train running moderately without working steam, and with brakes set, in a covered station. There was a decided rumbling noise, something like that of a train going over a bridge. Just before the engine reached a point opposite plaintiff, he suddenly swerved to the right into the pathway of the locomotive and was almost instantly struck. Others saw the train some little time before it reached plaintiff. He could easily have done so had he looked around before he swerved to the right, or for a considerable time theretofore. There was very positive evidence that persons near by saw plaintiff's danger just before he was struck; tried to warn him; that the engine bell was ringing, and that the headlight did not come up to the statutory requisites. There

was evidence to the effect that there was a standing truck between the track and the fence, near where the accident occurred and that plaintiff was thrown against it; further, that he could easily have kept out of danger notwithstanding such truck.

The court directed a verdict in favor of defendant, holding that the uncontradicted evidence of plaintiff having walked over 200 feet along the track without looking back, when he knew or ought to have known that a train was expected thereon, and, finally, entered the zone of danger when the train was in plain sight of him and he could just as well have kept close to the fence, or close enough thereto to be out of danger, was clearly contributory negligence, and that the statutory requirement as to headlights, sec. 1809*v*, Stats., is so indefinite and uncertain as to be impracticable of enforcement, and therefore void. Judgment was rendered in favor of the defendant.

For the appellant the cause was submitted on a brief signed by *John W. Burkhardt* and *Lehr, Kiefer & Reitman,* attorneys, and *J. Elmer Lehr,* of counsel.

For the respondent there was a brief signed by *Edward M. Smart* and *Miller, Mack & Fairchild,* and oral argument by *Mr. J. G. Hardgrove, Mr. Edwin S. Mack,* and *Mr. Smart.*

The following opinion was filed October 26, 1915:

MARSHALL, J. The question of whether the evidence would fairly have warranted a jury finding that appellant was free from efficient contributory negligence must be answered in the negative. The fact that he walked for over 200 feet along between the track and the fence, keeping near enough to the latter to be outside the zone of danger, knowing, or with efficient reason for knowing, that a train was soon expected, and then, without looking or having looked back in the meantime, though the train was in plain sight at the last and only a few feet away, turned out of the safe way into that

of danger, resulting in the accident, seems to make far too clear a case of contributory negligence to admit of holding that the trial court was clearly wrong in so deciding.

The suggestion of counsel that there is no evidence that plaintiff knew of the zone of danger, is met by his own evidence that he walked, commonly, near the fence because that was the safe place, and by the fact that the danger of walking so near the track, as he did at the instant of the accident, in case of a train approaching, as happened, must have been obvious. Certainly, no warning of the danger was necessary to a person as familiar as appellant must have been with the whole situation.

Slipperiness of the platform is suggested as a possible reason for appellant's swerving away from the fence; but neither court nor jury could properly act upon mere possibilities. The evidence does not seem to admit of more than the merest conjecture that the condition of the platform had anything to do with the accident. The fatal thing was plaintiff's turning toward the track without looking back. His testimony that he had traveled but a short distance near the track before he was struck, that, before, he traveled pretty near the fence because it was safer, accords with the evidence of the fireman that he was at a safe distance from the engine until it was within a few feet of him.

The question of whether the headlight statute, sec. 1809*v*, Stats., is unconstitutional, does not need to be answered in this case. We conclude to leave that matter open for now. It is sufficient that the statute is entirely immaterial to the situation we have to deal with.

The statute provides that, in case of a violation thereof, the offender "shall be liable for all damages resulting in whole or in part, directly or indirectly, from such violation." Therefore, to make a case under it, reasonably clear evidence is necessary, that the insufficient headlight had some causal connection with the damages claimed. We agree with counsel

for respondent that there is no such evidence in this case. The vicinity of the accident must have been so brilliantly lighted by the nine electric arc lights that appellant had no need for more light to enable him to appreciate his position and surroundings, and it is no more than matter of conjecture that a better headlight would have appreciably added to the illumination. No more efficient headlight was necessary to enable the trainmen to discover appellant, for he was in plain sight of and was observed by them. No more efficient headlight was necessary to aid in appellant's knowing of the approaching train, for he knew it was momentarily expected, and it was in plain sight from his location for some time before and at the instant he turned into the zone of danger. Therefore, clearly, the statute does not cut any figure in the case.

By the Court.—The judgment is affirmed.

A motion for a rehearing was denied, with $25 costs, on December 7, 1915.

LEUCH, Appellant, vs. BERGER and others, Respondents.

October 26—December 7, 1915.

Libel: Words actionable per se: *Newspaper publication: Meaning of language: Pleading: Questions for jury: Charges of graft, etc.: Liability of business manager and editor.*

1. Language which imputes a crime is libelous *per se*, as is also language calculated to subject a person to public hatred, degradation, ridicule, or contempt.
2. The question whether or not an article is capable of a libelous meaning is for the court, and such meaning may be so clear that the court should say as matter of law that it is libelous; but where there is any substantial doubt as to what the meaning is, it is for the jury to say whether or not the meaning attributed to the language is the correct one.

3. Where there is no ambiguity in respect to the actionable quality of the language used nor as to the person whom it concerns, no allegation by way of inducement or colloquium is necessary.
4. The defendant may not attribute some recondite meaning to an alleged libelous article and proceed to justify on that basis, for the words must be construed in the plain and popular sense in which they would naturally be understood, read in the light of the entire article.
5. The freedom of the press does not comprehend the publication of untruthful statements about a private person or public officer, where such statements charge crime or tend to make the individual or officer attacked an object of public hatred, ridicule, or contempt; and the publisher is bound at his peril to know whether statements of that character are true or false before they are given out to the world as true.
6. A newspaper article conspicuously headed "City Clerk's Force Charged with Graft," and stating, among other things, that "graft charges" had been made against the "city clerk, and members of his office force" (when in fact no such charges had been made when the article was published), that "City Clerk Leuch and every member of his department are said to be implicated in a scheme to get part of the money appropriated by the common council for the preparation of the tax levy" (when there was no way in which the city clerk could lawfully get any part of such money), might be understood as charging such city clerk with a criminal act, as well as setting forth untrue matter which was calculated to hold him up to public hatred, contempt, and degradation; hence it could not be said as matter of law that such article was not libelous.
7. In such case, the liability of the newspaper corporation being a jury question, the liability of its business manager was also for the jury, upon proof that one of his duties consisted in attending to the circulation of the paper.
8. It being admitted in the answer that the editor of the newspaper had immediate charge and control of it and of all matters published therein, and had active management and control of all the publications of the paper, the question of his liability was also for the jury, even though he testified he knew nothing about the article until after it was published, that he was serving as a Congressman in Washington, D. C., at the time, and that he had nothing to do with the collection of facts from which it was written.

APPEAL from a judgment of the circuit court for Milwaukee county: GEORGE CLEMENTSON, Judge. *Reversed.*

This is an action for libel, based on the publication of the following article:

"EXTRA.

"City Clerk's Force Charged with Graft.

"Graft charges against *Peter F. Leuch,* city clerk, and members of his office force, were made to the common council Monday afternoon following a probe conducted by Aldermen Coleman, Aldridge, and Krzycki, Social-Democrats.

"City Clerk *Leuch* and every member of his department are said to be implicated in a scheme to get part of the money appropriated by the common council for the preparation of the tax levy.

"Investigation by the Social-Democrats showed that the employees in the clerk's office were receiving their salaries as department clerks and were also receiving money from the fund set aside for the preparation of the tax levy, which is in direct violation of the city charter, forbidding extra compensation to city employees.

"While the common council was in session Monday afternoon the Social-Democrats obtained access to the tax payroll and got the evidence.

"Charles S. Brand, deputy city clerk, who is receiving $150 a month salary, got $180 last month for 'work on the preparation of the tax levy.'

"Herman C. Schultz, first assistant city clerk, receives $166.66 a month salary, and got $57 last month for 'work on the preparation of the tax levy.' Mr. Schultz was a party to the extra payments under protest, his position, it is understood, hanging in the balance.

"Emil F. Allee, second assistant city clerk, is receiving $83.33 a month salary, and got $91.20 last month for 'work on the preparation of the tax levy.'

"John F. Reiff, committee clerk in the city clerk's office, is receiving $125 a month salary. He got $108 last month for 'work on the preparation of the tax levy.'

"Owen D. Murphy, clerk in the city clerk's office, is receiving $100 a month salary. He got $108 a month for 'work on the preparation of the tax levy.'

"'Eddie' Hinkel, Rose henchman, got $185 for 'work on the preparation of the tax levy.' He, however, is not a regular city employee.

"Alderman Coleman introduced a resolution in the council requesting City Clerk *Leuch* to report to the aldermen the names of the city employees who were receiving double pay in compiling the tax levy. There was surprise on the faces of the 'nonpartisan' henchmen, who thought they had been secure in their abstractions from the coffers of the city.

"Meanwhile Alderman Coleman had been gathering his evidence, and when City Clerk *Leuch* read the resolution he was armed with all the facts, and urged the passage of the resolution merely as a formality to have the city clerk inform the aldermen of the peculiar jobholding started by the 'nonpartisans' soon after they got in office.

" 'This is graft pure and simple,' said Alderman Coleman. 'The employees of the city clerk's office had been drawing double pay since the beginning of the preparation of the tax levy. City Clerk *Leuch* was allowed money to hire additional clerks to prepare the tax levy blanks and lists and he did gather in "Eddie" Hinkel and other henchmen of "Dave" Rose and the corrupt machine which was turned to power on the wave of "nonpartisan" victory. But they were not satisfied to give these fellows jobs. They went after some of this easy money and a good piece has been divided up among them.'

"Charles S. Brand, accused by the Social-Democrats with receiving two checks from the city, is an officeholder of the old Rose machine. When *Peter Leuch* became city clerk Brand came back into a steady job for two years.

"Herman C. Schultz, also charged with receiving double pay, has been in the city clerk's office under several administrations. Because of his knowledge of the office affairs he was held over during the tenure of the Social-Democrats, and Carl D. Thompson, then city clerk, praised his work highly as that of a valued and trusted employee.

"John F. Reiff was appointed committee clerk about a month ago. He had been a clerk in *Leuch's* department. He was at one time secretary for 'Dave' Rose.

"Owen D. Murphy is a son of ex-Alderman Murphy. He was brought to the office when the 'nonpartisans' took hold after two years' absence while Carl D. Thompson was city clerk."

By way of answer the defendants, among other defenses, alleged that the matters and things set forth in the article

were true. At the close of the evidence the defendants moved to direct a verdict, which motion was denied, the court stating that "the article when published without explanation was of a libelous character . . . on its face. . . . There must be a recovery by the plaintiff unless it is justified by allegation and proof. The allegation or justification is made in the answer, and the proof in reference to it we have heard." Continuing, the court said:

"I think the article must be considered as a whole in order to determine the specific charge made. The article, when carefully read, is an article that charges that the city clerk violated the law in giving extra pay to members of his department who were drawing a salary; that is as I construe that article. And unless it can be shown by the defendant that that is true, there must be a recovery."

The court prepared a special verdict containing the following questions:

"(1) Did the plaintiff pay or cause to be paid out of the fund placed in his hands of $6,000, for the employment of special help to prepare for the tax levy of 1912, compensation to members of the regular salaried force in his office for extra work done by them in preparation for the tax levy?"

"(2) Was any one of those who were responsible for the conduct of the Milwaukee Leader actuated by express malice against the plaintiff, that is, by a desire and intention to injure him in the publication of the article in question in this case?"

(3) (Related to assessment of damages.)

There was no dispute or controversy as to how the first question should be answered, and it was properly answered "Yes" by the court. After the jury had deliberated some time and had announced that they were unable to agree on the answer to be returned to the second question in the special verdict, the court directed the jury to answer the question "No," and on the verdict thus directed judgment was entered dismissing the complaint, from which judgment plaintiff appeals.

For the appellant there was a brief by *Marshutz & Hoffman* and *Quarles, Spence & Quarles,* attorneys, and *J. H. Marshutz* and *W. C. Quarles,* of counsel, and oral argument by *W. C. Quarles* and *J. H. Marshutz.*

For the respondents there was a brief by *Cochems & Wolfe, W. C. Zabel,* and *Max Schoetz,* attorneys, and *Horace B. Walmsley,* of counsel, and oral argument by *Mr. H. O. Wolfe* and *Mr. Walmsley.*

BARNES, J. Sec. 3 of ch. 376, Laws 1897, provides:

"The city clerk shall make the tax roll of such city as required by law, but he shall receive no compensation for the same other than that provided in section one of this act, but he is hereby authorized to employ such expert assistants as he may deem necessary, the aggregate amount to be paid for such service to be determined by the common council and appropriated for such service from year to year."

In 1912 the city council made an appropriation for the purpose specified in the statute above quoted, and the city clerk proceeded to employ additional help to make out the tax roll for that year. A number of the persons so engaged were employees in the city clerk's office, who performed the extra service in preparing the tax roll outside of regular office hours and were paid therefor. In *Milwaukee v. Reiff,* 157 Wis. 226, 146 N. W. 1130, the court decided that under the statute, sec. 925—31*c,* there was no legal authority for paying these employees anything additional to their salaries on account of any work outside of office hours which they might do on the tax roll. This plaintiff was the city clerk when the transaction detailed took place.

It was the contention of the plaintiff on the trial that in employing help on the tax roll he pursued a practice which had long been in vogue in Milwaukee; that he did so believing in good faith that he was acting within the law in so doing; that the city got value received for the money paid out; that plaintiff did not profit in any sum or amount on account

of the making of the tax roll; and that he was guilty of no intentional wrong doing, but simply of a technical violation of the law which resulted in no substantial injury to any one.

It is and was the claim of the defendants that the article in question, when read and considered as a whole, did no more than charge the plaintiff with having unlawfully paid to the regular employees of the clerk's office named in the article the sums stated, and that the charge was true and therefore the article was not libelous. The controversy in this court presents but a single question, to wit: Should it be said as a matter of law that the article in question does not contain libelous matter?

The law of libel is pretty well settled in this state, and the difficult thing in most libel cases is to properly apply established legal principles to the facts in the case presented.

Language which charges or imputes a crime is libelous *per se*. *Fehlhaber v. McFadden,* 156 Wis. 462, 146 N. W. 484; *Culver v. Marx,* 157 Wis. 320, 322, 147 N. W. 358; *Bilgrien v. Ulrich,* 150 Wis. 532, 137 N. W. 759; *Ruhland v. Cole,* 143 Wis. 367, 375, 127 N. W. 959. The rule is so elementary that it is really unnecessary to cite authority in support of it. It has also been held in a long line of cases, beginning with *Bradley v. Cramer,* 59 Wis. 309, 18 N. W. 268, and continuing to *Williams v. Hicks P. Co.* 159 Wis. 90, 150 N. W. 183, that language calculated to subject a person to public hatred, degradation, ridicule, or contempt is libelous *per se*. Whether or not an article is capable of a libelous meaning is a question for the court to pass upon. *Scofield v. Milwaukee Free Press Co.* 126 Wis. 81, 87, 105 N. W. 227; *Robertson v. Edelstein,* 104 Wis. 440, 442, 80 N. W. 724; *Dabold v. Chronicle P. Co.* 107 Wis. 357, 362, 83 N. W. 639; *Bradley v. Cramer,* 59 Wis. 309, 312, 18 N. W. 268. Where there is any substantial doubt as to what the meaning of the alleged libelous publication is, it is for the jury to say whether or not the meaning attributed to the language used is

the correct one. *Bradley v. Cramer, supra,* p. 312; *Dabold v. Chronicle P. Co., supra,* p. 362. The meaning may be so clear that a court should say as a matter of law that the article is libelous, leaving only the question of damages for a jury to pass upon. *Williams v. Hicks P. Co.* 159 Wis. 90, 100, 150 N. W. 183. Where there is no ambiguity in respect to the actionable quality of the language used nor as to the person whom it concerns, no allegation by way of inducement or colloquium is necessary. *Bradley v. Cramer, supra.* The defendant may not attribute some recondite meaning to the published article and proceed to justify on this basis. *Pfister v. Milwaukee Free Press Co.* 139 Wis. 627, 121 N. W. 938. The words used must be construed in the plain and popular sense in which they would naturally be understood. *Bradley v. Cramer, supra.* And the words claimed to be libelous must be read in the light of the entire article. *Ingalls v. Morrissey,* 154 Wis. 632, 645, 143 N. W. 681, and cases cited.

Having in mind these legal principles, the question is: Did the trial court err in holding that the article in question went no farther than to charge that plaintiff unlawfully disbursed funds belonging to the city to persons not entitled to receive them because they could not lawfully collect any money for the extra service which they performed? If this be the correct interpretation of the alleged libelous publication, the legal conclusion reached by the lower court is correct.

It seems pretty plain that this article is susceptible of being understood as meaning a great deal more than that plaintiff employed persons to work on the tax roll whom he had no right to employ. The charge of graft was made against the "city clerk's force" in conspicuous headlines. The opening paragraph stated that "Graft charges against *Peter F. Leuch,* city clerk, and members of his office force, were made to the common council Monday afternoon. . . ." This applies to *Leuch* as well as to his subordinates. As a matter of fact,

no such charges had been made when the article was published. The second paragraph stated that "City Clerk *Leuch* and every member of his department are said to be implicated in a scheme to get part of the money appropriated by the common council for the preparation of the tax levy." *Leuch* was a salaried officer, and there was no way in which he could lawfully get any part of the money appropriated for making the tax roll. If the statement was true, it was equivalent to saying that *Leuch* had in fact entered into a scheme to embezzle public funds and that a conspiracy had been entered into between him and his employees to loot the public treasury. Continuing, the article states:

"City Clerk *Leuch* was allowed money to hire additional clerks to prepare the tax levy, blanks, and lists, and he did gather in 'Eddie' Hinkel and other henchmen of 'Dave' Rose and the corrupt machine which was turned to power on the wave of 'nonpartisan' victory. But they were not satisfied to give these fellows jobs. They went after some of this easy money and a good piece has been divided up among them."

These statements are accompanied by a recital giving the names of employees who drew pay for alleged extra work and the amounts paid to them. Had the defendants confined the article to these recitals they would have been within their rights. But they did not do so.

Before this court decided the *Reiff Case* (*Milwaukee v. Reiff,* 157 Wis. 226, 146 N. W. 1130) there was a fairly debatable question as to whether sec. 925—31*c* applied to the city of Milwaukee. Following the custom of his predecessors, or at least some of them, the plaintiff might have honestly reached a wrong conclusion as to what the law was, without being guilty of any crime or even moral turpitude. It was proper enough for a newspaper to state the facts and to express the opinion that in its judgment the acts done were unlawful, but if the officer acted in good faith and simply made an honest mistake it was not allowable to brand him as

a conspirator and a crook. This court has no disposition to restrain the legitimate freedom of the press. That freedom does not comprehend the publication of untruthful statements about a private person or public officer, where such statements charge crime or tend to make the individual or officer attacked an object of public hatred, ridicule, or contempt. In the hurry with which news is gathered and put into print, it is often difficult to verify its accuracy. But where it is of the character stated, the publisher is bound at his peril to know whether it is true or false before it is given out to the world as true.

We hold that the article in question might well be understood as charging the plaintiff with a criminal act, as well as setting forth matter not justified by the evidence, which was calculated to hold the plaintiff up to public hatred, contempt, and degradation. A statement that an officer employed persons to do work whom he had no right to employ carries very little odium, if the action taken was the result of an honest mistake. It is an entirely different matter to assert that the act was done in pursuance of a scheme to enrich the officer and his friends or henchmen at the public expense and to charge in effect that he and they are grafters.

It is argued that no case was made against the defendants *Bistorius* and *Berger*. As to *Bistorius* the proof showed that he was business manager of the newspaper and that one of his duties consisted in attending to the circulation of it. Under all the authorities the liability of *Bistorius* was a jury question, inasmuch as we hold that the liability of the newspaper corporation should have been submitted to the jury.

Mr. Berger was the editor of the paper and testified that he knew nothing about the article until after it was published. There is some conflict of authority in reference to the respon sibility of an editor under these circumstances. Most textwriters place editors in the same class as proprietors and hold that ignorance is no excuse whatever. Odgers, Libel & S.

(5th ed.) 170; Merrill, Newspaper Libel, 249; Newell, Slander & L. (3d ed.) p. 461, § 480; *Hunt v. Bennett,* 19 N. Y. 173; *Spooner v. Daniels,* 22 Fed. Cas. No. 13,244*a*.

The court in *Smith v. Utley,* 92 Wis. 133, 65 N. W. 744, stated the law to be as follows:

"It is laid down by all the text-writers that the proprietor, publisher, editor, author, and printer are severally and jointly liable. 13 Am. & Eng. Ency. of Law, 372; Fraser, Libel, 7–9, and notes; Odgers, Libel & S. (Bigelow's ed.) *453; Newell, Defamation, S. & L. 239; Townshend, Slander & L. § 115, note 1. This liability attaches to the editor upon the theory that the matter is constructively under his supervision, and neither the editor nor proprietor is allowed to plead in defense that he was ignorant of the publication. Merrill, Newspaper Libel, 53. While evidence that the defendant did not actively or constructively participate in the publication may be introduced, neither the editor, publisher, nor proprietor can defend on the ground merely that he did not know about the libel until after it was published. Merrill, Newspaper Libel, 249. Publisher and managing editor are treated alike by the standard text-writers. This appears to be so elementary that the question has rarely, in recent years, been presented to the courts for consideration. In *Watts v. Fraser,* a case decided in 1835 in the court of King's Bench, and reported in 7 Adol. & E. 223, both the editor and printer were held liable, though, as said in Fraser, Libel, 10, they had no knowledge whatever of the publication."

We would not be inclined to extend this rule to a case of mere nominal editorship—one where a person held the title but did not exercise the functions appertaining to the position.

The facts before us bearing on the liability of *Berger* are these: It is alleged in the complaint that *Berger* was the editor and that one Heath was the associate editor, "and that at all of the times hereinafter mentioned said defendants *Victor L. Berger* and Frederic Heath had and have immediate charge and control of said newspaper, and the immediate direction and control of all matters published therein; and had and have active management and control of all the publica-

tions of said newspaper." These facts were admitted by the answer, in which all of the defendants joined; so that on the pleadings it stood as a verity in the case that *Berger* had immediate charge and control of the newspaper and the immediate direction and control of the matters published therein as well as the active control of all publications of the paper. If the case rested wholly upon the pleadings there can be no doubt that *Berger* would be liable if the newspaper was, under the rule of *Smith v. Utley, supra.* But he was called as a witness and testified that he "was one of the defendants in the case and that he was the editor-in-chief of the Milwaukee Leader, and was such on December 9, 1912, and that he determined the policy of the paper and was also the superior of Osmore Smith. That on December 9, 1912, he represented the Fifth district of the state of Wisconsin in the House of Representatives at Washington and had been away from the city of Milwaukee for over a year and a half. That he knew the plaintiff, but had never spoken ten words to him in his life and had never been personally introduced to him. That he received the first intimation that the article was published in the Leader on December 9th, when he saw it in Washington, D. C., and that he had nothing to do with the collection of the facts from which the article was written."

This evidence was received without objection and without any withdrawal of the admission of the answer. If the evidence was offered for the purpose of mitigating damages, it would not necessarily conflict with the admission referred to. If it was offered as tending to prove that there was no liability whatever, it would run counter to the admission. In any event the case as to *Berger* should have gone to the jury. Giving his evidence the most favorable construction which it could possibly bear, the admission might be considered by the jury, and if the jury chose to take it as true it might return a verdict accordingly.

By the Court.—Judgment reversed, and a new trial is ordered.

STATE EX REL. ATTORNEY GENERAL, Respondent, vs. STEBER, Appellant.

November 16—December 7, 1915.

Corporations: Toll-road company: Lease of road and franchise: Rights of assignees: Change of ownership: Presumption: Parol evidence: Lessee holding over: Annulment of franchise: Ouster.

1. A corporation to which had been granted a franchise to construct and operate a toll road leased the road and the franchise for fifty years. After several successive assignments of the leasehold interest, one W., in an instrument assigning the same, purported also to sell and transfer to the assignee the road itself with all the franchises and everything connected therewith. Thereafter, by ch. 103, Laws 1874, the lease was validated and the lessee and his assigns secured in the enjoyment of the property for said term. Subsequent assignments all declared that the intention was to convey the "lease and devise" assigned by W. In the absence of any showing that the original owner of the franchise had transferred or that there had been any judicial sale of the franchise and property, or any judgment against such owner, it is *held* that there can be no presumption that the ownership of the road and the franchise had vested in W. before he attempted to transfer them, and that each of the assignees took only the leasehold interest.
2. The existence of the lease being recognized in all the assignments, and the rights of each assignee after W. being expressly made referable to and measurable by the validated lease, parol evidence was inadmissible to show that the intention, when any of such transfers were made, was to convey the road and the franchise absolutely; nor could title by adverse possession be acquired by such assignees as against the original owner.
3. An assignee of the leasehold interest who continued to operate the road after the expiration of the term was a tenant holding over; and when, thereafter, the original owner's corporate charter and all its privileges and franchises were annulled such assignee was properly ousted from exercising any such franchise or privilege.

APPEAL from a judgment of the circuit court for Fond du Lac county: W J. TURNER, Judge. *Affirmed.*

Quo warranto action to oust the defendant from further operating a certain toll-road franchise and to exclude him from the road.

The facts, in brief, are these: In 1848 the territorial legislature of Wisconsin created a corporation under the name of Sheboygan and Fond du Lac Road Company, and conferred upon it a franchise for the construction and operation of a toll road between Sheboygan and Fond du Lac and to a point in the town of Taycheedah. The authorized road between Sheboygan and Fond du Lac and into said town was constructed and that portion which is the subject of this action was operated from some time prior to 1860. Such portion was separated from the balance of the system by an act of the legislature of 1861. April 3, 1863, the corporation leased such portion of the road and its corporate franchise to operate it to Henry J. Van Curen for fifty years from June 1, 1862.

The leasehold interest, by numerous assignments, became vested in the defendant March 11, 1908. It was validated by ch. 103, Laws 1874, the lessee, his heirs, representatives, and assigns being secured in the enjoyment of the leasehold property for such term only. In 1871 Thomas J. Wood, in due course, became the owner of such interest. Subsequently, in such year, he assigned it to Edward Pier and E. H. Galloway. In addition to assigning such interest, the instrument made by Wood contained these words:

"And I further sell and transfer to said Edward Pier and E. H. Galloway, for the consideration above expressed, the plank or gravel road covered by said lease, together with all the franchises, toll gates, and toll houses, and each and everything connected therewith, hereby giving and granting to said Pier and Galloway, their heirs and assigns, full authority to take exclusive possession and control of said road, gates and houses at any times they see fit to do so."

The instruments in the chain of title from Pier and Galloway to defendant all refer, for a definite description of the property intended to be conveyed, to the validated lease aforesaid. The one nearest Galloway and Pier was executed October 30, 1875, and declared the intention of it to be "to

convey . . . all the right of said Treleven and Filby under said lease and devise as assigned by Thomas J. Wood to said Edward Pier and E. H. Galloway." Substantially similar language was used in all the conveyances. The last one, executed March 11, 1908, contained, for words of description of the property intended to be transferred, this: "and hereby does transfer and assign to said *Michael Steber* all their right, title and interest in and to those certain instruments, lease and devise, dated April 3, 1863"—followed by a detailed statement of the assignments of said "lease and devise" from the original lessee down to the one to *Steber's* assignors—coupled with words showing an intention to convey the interest possessed by said grantors under said "lease and devise." *Steber* went into possession under such chain of title, and operated the toll road until this action was commenced.

The trial court found in accordance with the foregoing and this further: The defendant, from the time he took possession of the property under the assignment to him, exercised the rights acquired with knowledge that they would terminate June 1, 1912. None of the assignees acquired any rights in excess of those covered by the fifty-year lease, excepting defendant, until February 6, 1914, possessed the right of a tenant holding over after the expiration of his lease. On such day, by the judgment of the circuit court for Fond du Lac county, the plank-road company's corporate charter was vacated and all corporate privileges thereunder were declared annulled. The assignment from Wood to Pier and Galloway and all other instruments subsequent to the Van Curen lease, recognized the existence thereof and none of the assignees assumed to hold in opposition thereto or any greater interest than was covered thereby. Defendant is estopped from claiming the right of possession and operation of the road under claim of title to the original franchise. He is not entitled to the benefit of the statute of limitations pleaded; secs. 4211, 4215, 4222, 4224, Stats. Defendant has complied

with all requirements of the plank-road charter as to license fees and taxes.

Upon such facts the trial court decided that defendant, since February 6, 1914, had been a usurper of the corporate franchise and privileges, as alleged, and that plaintiff was entitled to judgment of ouster excluding him from possession of the highway in question and from all franchises and privileges in respect to the same, and enjoining him from exercising any such franchise or privilege. Judgment was rendered accordingly.

For the appellant there was a brief by *Swett & Keck,* and oral argument by *H. E. Swett.*

For the respondent there was a brief by the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general; a separate brief by *Charles D. Smith,* of counsel; and oral argument by *Mr. Messerschmidt* and *Mr. Smith.*

MARSHALL, J. The appellant's claim of title to the toll-road franchise and property was considered, to some extent, in *State ex rel. Mengel v. Steber,* 154 Wis. 505, 143 N. W. 156, where it was held that when such action was commenced, *Steber* was a lessee holding over and that the corporate franchise then existed. It was not necessary to decide whether he had any greater title than that of one holding over under the fifty-year lease, and the question as to such greater title was, therefore, left without any expression of opinion in respect thereto. Before this action was commenced the judgment, mentioned in the statement, annulling the corporate franchise and decreeing an abandonment of the property by the owner was rendered.

In the situation indicated it is obvious that if the predecessors of appellant, going back to Wood and from him to the legislative grantee, did not acquire anything under such grantee but the right covered by the fifty-year lease which was validated by the legislature, the judgment must be af-

firmed. That seems to be conceded and that no evidence was produced showing any paper transfer of the corporate franchise to operate the toll road; but it is insisted that, from events occurring before Wood obtained his interest, it should be presumed that his grantees, or one of them, obtained, through a judicial sale, title to the corporate property including such franchise. No judgment was shown to exist against the particular corporation. No definite connection was shown between any judgment and such corporation. No sale was shown to have taken place and no evidence, in our judgment, was produced to warrant more than a mere conjecture that any attempt was ever made to pass title to the corporate franchise and property by judicial proceedings.

The foregoing is supported by the significant circumstance that after the occurrences from which it is claimed it should be presumed the corporation was divested of title to its property and that the same was vested in Wood, the legislature was asked to validate the Van Curen lease. If Wood obtained title to the corporate property as well as to the lease, there was no need for the validating act. That pretty clearly indicates that he did not suppose he possessed more than the leasehold interest.

Much significance is claimed by counsel for appellant for the fact that, in the instrument of transfer made by Wood in 1874, after the words of description: "that certain lease and devise dated April 3, 1863," referring to the validated lease, words were added covering the property and franchise, as indicated in the statement; but in each of the instruments subsequently made, down to and including the one to appellant, it was expressly declared that the intention was to convey the "lease and devise assigned by Thomas J. Wood." There is nothing ambiguous about such instruments. They speak for themselves, as the trial court correctly held. They clearly cover the leasehold interest and nothing more. It follows that we are unable to disturb the finding as regards the title

of appellant being thus limited. The existence of the lease was recognized from beginning to end. The rights of each person in the chain of title were made expressly referable to and measurable by the validated lease. Therefore there is no question of title by adverse possession involved in the case.

We have not overlooked the parol evidence to the effect that when many of the transfers were made, the intention was to convey the toll road and franchise to operate it. The trial court doubtless considered such evidence incompetent and did not regard it in deciding the case. That was right, since, as we have before suggested, the written instruments are so plain that they must speak for themselves. If that were not so, mere evidence of what the parties intended would not be competent. If the evidence was worthy of consideration at all, it was well met by positive evidence that when appellant acquired his title, he was informed that it was limited to the leasehold interest.

Nothing further need be said. No disputed legal question is involved in the case. The evidence warranted the finding that appellant only acquired the leasehold interest. That expired before this action was commenced, and the corporate charter had been annulled. Therefore he then had no right to exercise the legislative toll-road privilege and so was a usurper thereof.

By the Court.—The judgment is affirmed.

STUMPF & LANGHOFF, LTD., Respondent, vs. ESPENHAIN DRY GOODS COMPANY, Appellant.

November 16—December 7, 1915.

Trade: Unfair competition: Purchase of bankrupt's stock: Exclusive right to advertise: Right of purchaser of exempt stock.

1. The purchase, at the trustee's sale, of all the stock in trade of a bankrupt except the portion allowed as exemptions, did not give to the purchaser such an exclusive right to advertise the sale of such bankrupt stock as would preclude one who bought the exempt portion from also advertising it as a part of said stock.
2. An advertisement of such exempt portion of the bankrupt's stock, containing no statements which were untrue or calculated to mislead the public, did not constitute unfair competition in trade, and a preliminary injunction against such advertising, at the suit of the purchaser of the stock sold by the trustee, was improvidently granted.

APPEAL from an order of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

This action was brought to restrain the defendant from continuing or permitting to be continued an advertisement of the sale of certain goods. The material part of the complaint charged in effect that on July 13, 1915, one Hubert A. Silberberg, a resident of the city of Milwaukee, was carrying on business under the name of Hubert's Lingerie Shop, at No. 593 Downer avenue, and on said day filed a petition in bankruptcy; that said Silberberg filed schedules in the bankruptcy court showing assets of $4,669.92; that in said proceedings said Silberberg claimed stock in trade exempt $200; that other proceedings were had in the matter and a trustee appointed who entered upon the discharge of his duties; that an inventory of the goods in bankruptcy was made and filed in the bankruptcy court; that said Silberberg claimed and was allowed by the said court, as and for exemptions under the laws of Wisconsin, out of the stock of goods, $200 worth of merchandise consisting of knitted suits, carriage robes,

sweaters, toques, leggings, and sacques; that on July 23, 1915, pursuant to notice, the trustee offered the bankrupt stock for sale, except the portion allowed the bankrupt as exemptions; that the plaintiff and defendant were rivals in business in Milwaukee and rival bidders at the sale, and that the plaintiff was the successful bidder, purchasing said goods for $1,550; that said Silberberg on the 23d day of July, 1915, sold to the defendant for $150 the $200 worth of merchandise allowed to him as his exemptions under the state law; that after the purchase of the $200 worth of exemptions by the defendant it caused a notice to be published in the Milwaukee Sentinel of July 25, 1915, advertising the sale thereof, a copy of which notice is attached to the complaint. The complaint further alleges that upon the purchase of a bankrupt stock of goods like that of Silberberg's at sales held by trustees in bankruptcy it is the custom and practice to advertise such stocks for sale as having been purchased at bankruptcy sales, and that the exclusive right to so advertise constitutes a large element in fixing and determining and greatly increasing the price paid for said stock, and if such opportunity and right of the purchaser to so exclusively advertise the stocks thus purchased is not protected such element of value is destroyed; that the plaintiff purchased said stock with the intention of advertising the same for sale at its store in the city of Milwaukee as having been purchased at said bankruptcy sale; that the defendant in causing to be published the advertisement, Exhibit A, intended to defraud the public into the belief, contrary to the fact, that it had purchased and was thus offering for sale at sacrifice prices a large part of the stock of the said Hubert's Lingerie Shop, which had been sold to the plaintiff, and intended and designed to cheat and defraud the plaintiff of a large part of the value which it had otherwise received on the advertisement and sale of said stock; that the plaintiff has suffered loss and damage by the unlawful and illegal acts of the defendant.

The plaintiff also produced and used on the motion for temporary injunction an affidavit setting forth that an advertisement substantially similar to Exhibit A appeared on the 25th day of July, 1915, in the following newspapers published in Milwaukee, viz. Germania, Free Press, and Journal, in addition to the publication in the Sentinel before referred to, and that the cost of such advertisements in said four papers at regular rates is $75.89, and that the fixtures sold to the plaintiff were appraised in the bankruptcy court at $165. Two affidavits were also produced by the defendant on the hearing to the effect that all acts on the part of the defendant were in good faith and that the facts stated in the advertisement, Exhibit A, were true and there was no intent to cheat or defraud; that the acts of the defendant in advertising in no way injured the plaintiff or any other person; that the plaintiff's purchase of the bankrupt stock gave it no exclusive right to advertise the sale, and that the plaintiff acquired no right to interfere with the free and fair disposition of the property of the defendant; that the plaintiff's expense in advertising in the Milwaukee newspapers the sale of the property purchased at the bankrupt sale at regular rates was $310; that defendant's expense in advertising at regular rates was about $51. Other facts contained in the affidavits we need not refer to here.

Upon the complaint and affidavits referred to the court below ordered that during the pendency of the action the defendant be enjoined and commanded to discontinue the advertisement of which Exhibit A, attached to the complaint, is a copy, so far as the sale refers to stock of Hubert's Lingerie Shop, bankrupt, and to refrain from publishing the same or any similar advertisement in any newspaper in the city of Milwaukee unless such advertisement is so corrected and amended that the public shall not be misled into believing that the defendant is offering for sale any part of that portion of the stock formerly owned by Hubert A. Silberberg in the

business under the name of Hubert's Lingerie Shop which the plaintiff purchased at the bankruptcy sale mentioned in the complaint; from which order the defendant appealed.

For the appellant there was a brief by *Kronshage, McGovern & Hannan,* and oral argument by *F. E. McGovern.*

For the respondent there was a brief by *Hoyt & Goff,* and oral argument by *Guy D. Goff.*

KERWIN, J. The facts in this case are practically undisputed. The parties to the action seek to deduce different conclusions from undisputed facts. The defendant bought the exempt portion of the stock of the bankrupt and the plaintiff bought the balance. Each advertised the sale of the stock purchased by it. The defendant advertised in the Sunday issue of the Milwaukee Sentinel:

"ESPENHAINS.

"WE SECURED AND OFFER FOR MONDAY'S SELLING THE EXEMPTED STOCK OF HUBERT'S LINGERIE SHOP (BANKRUPT). 593 Downer Ave.

"Consisting mainly of Infants' and Children's Wear, at About HALF THE WHOLESALE COST.

"The purchase was not a large one, and the various lots are consequently limited, but we assure you that the savings we offer you are substantial. You should not fail to take advantage of this offering of NEW CLEAN MERCHANDISE AT ABOUT HALF PRICE.

"In being permitted by process of law to select his legal exemption, Mr. Hubert A. Silberberg, the proprietor, naturally selected THE CHOICEST ITEMS, and since we bought the EXEMPTED STOCK we offer WHAT THE PROPRIETOR CONSIDERED HIS BEST MERCHANDISE AT RADICALLY LOW PRICES."

Then follows a description of goods with value and discount prices.

The plaintiff also a few days later published an advertisement of the sale of goods belonging to the bankrupt stock in

four newspapers published in the city of Milwaukee, viz. Germania, Free Press, Journal, and Sentinel. The advertisement published by plaintiff reads as follows:

"STUMPF & LANGHOFF.
"STUMPF & LANGHOFF. STUMPF & LANGHOFF.

"BANKRUPT SALE OF HUBERT'S LINGERIE SHOP.
"593 Downer Avenue.

"WOMEN'S AND MISSES' DRESSES, WAISTS, MUSLINWEAR, GLOVES, KNIT UNDERWEAR, GIRLS' AND INFANTS' WEAR.

"EVERYTHING AT 40c. ON THE DOLLAR.
SAVE 50 %.

"We came into possession of the entire stock of Hubert's Lingerie Shop through the United States bankruptcy court. Hubert's Lingerie Shop was well known for exclusiveness and high quality. Practically all the merchandise is fresh, clean, new, and highly desirable. Our purchase price was 40c. on the dollar. Your purchase prices, therefore, will leave you a saving of 60 per cent., CONSIDERABLY MORE THAN ONE HALF. It is a sale which is bound to make a deep and lasting impression upon the memory of all those who will share in the extraordinary bargains. But we'll let the merchandise and prices speak for themselves. Read them below."

Then follows a description of some of the articles with prices.

It is clear from the advertisements of both parties that they were trying to make as much as possible out of their respective purchases. Each had a part of the bankrupt stock and was advertising the sale of it. As will be seen, the advertisement by plaintiff was of "Hubert's Lingerie Shop." The advertisement of plaintiff would strongly indicate that it was offering for sale the entire stock. The advertisement of defendant was of sale of the exempt stock which it purchased. So it is difficult to see how the court below could find that the advertisement of defendant was deceptive, false,

and fraudulent. True, as contended, there was a display in large type of certain parts of the advertisement, but the facts stated in the parts displayed were true. There was no false statement in the advertisement. Surely the defendant had a right to state the facts in advertisement, even if such statement had the effect of drawing trade away from plaintiff.

Counsel for respondent furnish us with a very able discussion of the doctrine of unfair competition in trade and the law relating to trade-marks and trade-names. It is clear that there is no question of trade-mark or trade-name in the instant case, and the only question is whether the defendant is shown by the record to have been guilty of any unfair competition. There was no effort by defendant to palm off its goods as the goods of plaintiff. The facts respecting the purchase of the exempt stock and sale thereof were true, and there was nothing in the advertisement calculated to mislead the public. In *Howe S. Co. v. Wyckoff, Seamans & Benedict,* 198 U. S. 118, 25 Sup. Ct. 609, 49 L. ed. 972, in speaking of what constitutes unfair trade the court said: "The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another; and if defendant so conducts its business as not to palm off its goods as those of complainant, the action fails."

It is alleged in the complaint that upon the purchase at sales made by receivers and trustees it is the custom of the purchaser to advertise such stock, and that the exclusive right to so advertise constitutes a large element in determining and greatly increases the price paid for such stock at such sales, and if such right is not protected such element of value is destroyed.

Clearly the plaintiff obtained by the purchase of a part of the stock no exclusive right to advertise and prevent the defendant from advertising the sale of such portion as it purchased.

The chief complaint of plaintiff's counsel seems to be that the advertisement of the defendant, displayed as it was in part in large type, was calculated to deceive. We cannot agree with counsel for plaintiff in this regard. We are satisfied that upon the undisputed facts no case was made, hence the preliminary injunction was improvidently granted, and the order must be reversed.

By the Court.—The order appealed from is reversed, and the cause remanded for further proceedings according to law.

ESTATE OF SMITH: SMITH, Executrix, Respondent, vs. THE STATE and another, Appellants.

November 16—December 7, 1915.

Taxation: Inheritance tax: Allowance to widow: Construction of statutes.

1. An allowance made to a widow, pursuant to sub. (2), sec. 3935, Stats. 1913, for her support and that of the children pending the administration of the estate of her deceased husband, is neither an inheritance nor a gift from the deceased made in contemplation of death and is not subject to an inheritance tax.
2. There is no "transfer" of such allowance, within the meaning of that word as used in secs. 1087—1 to 1087—24, Stats.
3. The rule that weight should be given by the courts to the construction of a statute by the officers or department whose duty has been to execute it, does not apply where there is no ambiguity in the statute; nor does it apply to the erroneous rulings of inferior tribunals so as to control or affect the decision of the superior tribunal having by law the power and duty to review directly such rulings.

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

The appeal is from a judgment of the circuit court affirming the order of the county court of Milwaukee county.

For the appellants there was a brief by the *Attorney General, E. E. Brossard,* assistant attorney general, and *Winfred C. Zabel,* district attorney for *Milwaukee County,* and oral argument by *Mr. Brossard.*

For the respondent there was a brief by *Flanders, Bottum, Fawsett & Bottum,* and oral argument by *F. L. McManamy.*

TIMLIN, J. The *State* and the *County of Milwaukee* appeal from a judgment refusing to charge an inheritance tax upon the transaction of giving and receiving an allowance to the widow for her support and that of the children pending the administration of the estate, under sub. (2) of sec. 3935, Stats. 1913. Sec. 1087—1, Stats. 1913, imposes an inheritance tax "upon any transfer of property, . . . when the transfer is by will or by the intestate laws of this state from any person dying possessed of the property while a resident of the state, . . . or a nonresident leaving property within the jurisdiction of the state, . . . or when the transfer is by deed, grant, bargain, sale or gift, made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death," . . . or when the transfer is by exercise of a power of appointment. . . . "The tax so imposed shall be upon the clear market value of such property . . . and only upon the excess of the exemptions hereinafter granted." Sec. 1087—24 defines the word "property" as used above to mean "the real and personal property or interest therein of the testator, intestate, grantor, bargainor, vendor or donor passing or transferred to individual legatees, devisees, heirs, next of kin, grantees, donees, vendees or successors, and shall include all personal property within or without the state." Also: "the word transfer, as used in sections 1087—1 to 1087—24, inclusive, shall be taken to include the passing of property or any interest therein, in possession or enjoyment, present or future, by inheritance, descent, devise, succession, bequest,

grant, deed, bargain [and] sale, gift or appointment in the manner herein prescribed. . . ."

The allowance to the widow is not: First, a transfer by will or by the intestate laws of this state from any person. Second, the property in question is not transferred to the widow as legatee, devisee, heir, next of kin, grantee, donee, vendee, or successor, but by order of the court acting under a statutory power and for the purpose of supporting herself and her children. Third, there has been no *transfer* in the sense of "passing . . . property . . . by inheritance, descent, devise, succession, bequest, grant, deed, bargain [and] sale, gift or appointment." It seems very obvious that the transaction in question here is not covered or described by any or all the words of the statutes referred to.

It is argued that the exemptions from the inheritance tax in case of property going to the widow are sufficiently liberal and are exclusive, and that this exemption should not, either upon equitable grounds or upon a fair construction of the exemption statute, be allowed to the widow. But this is not an exemption from a tax. It is a transaction upon which the legislature has imposed no inheritance tax on the broad ground that it is neither an inheritance nor a gift from the deceased made in contemplation of death.

It is further contended that the state tax commission has placed upon the statutes above referred to such construction as to include this allowance among the transfers subject to inheritance tax. It is said that weight should be given to this ruling of the department in construing the statute. But this argument fails on two grounds: (1) The rule referred to does not apply where there is no ambiguity in the statute but its provisions are clear and unmistakable as to the subject under examination. *Lawrence Univ. v. Outagamie Co.* 150 Wis. 244, 136 N. W. 619. (2) This rule does not apply to the erroneous rulings of inferior tribunals so as to control or affect the decision of the superior tribunal having by law the power and duty to review directly such rulings. *Ibid.*

In view of the plain language of the statute it seems unnecessary to refer to precedents outside of the state, but we preserve the following: *Estate of Kennedy,* 157 Cal. 517, 108 Pac. 280, 29 L. R. A. N. S. 428; *Crenshaw v. Moore,* 124 Tenn. 528, 137 S. W. 924, 34 L. R. A. N. S. 1161. Compare *Billings v. People,* 189 Ill. 472, 59 N. E. 798.

By the Court.—Judgment affirmed.

FILER & STOWELL COMPANY, Respondent, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

November 17—December 7, 1915.

Appeal: Right is statutory: Time for taking cannot be extended: Condemnation of land for railroad: Failure to appeal in time: Power of courts: Equitable relief.

1. The right of appeal is wholly statutory and must be exercised upon such terms and within such limitations as the written law prescribes.
2. After the expiration of the thirty days limited by secs. 1849, 1852, Stats., for appealing from the award of commissioners in a proceeding to fix the compensation to be paid for land taken for a railroad, the court cannot extend the time for taking such appeal. Neither sec. 2831 nor sec. 2832, Stats., authorizes such relief; nor has the court inherent power to grant it.
3. If the circuit court had power to grant such an extension of time a very strong case would be required to warrant a decision on appeal that there was an abuse of discretion in refusing to grant it.
4. Whether under special circumstances a court of equity might interfere to prevent the person in whose favor the award was made from having the benefit of it, is not decided. If such power exists the relief must be sought in an independent action; and no leave of court to bring such an action is necessary.

APPEAL from an order of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

The *Chicago, Milwaukee & St. Paul Railway Company,* without contracting with the owner, or exercising the right of eminent domain, appropriated for its railway purposes certain valuable property belonging to the plaintiff. After the lapse of considerable time, plaintiff commenced proceedings under sec. 1852, Stats., for a determination of the amount which the railway company should pay for the property so taken. In due course, the precise property which should form the subject of the appraisal was determined, and December 3, 1914, the commissioners awarded plaintiff $30,950 and filed their determination in the office of the clerk of the circuit court. By reason of failure of one of the commissioners to notify the attorneys for the railway company of such facts, as he had agreed to do, they did not know thereof until more than thirty days after such filing. They relied upon such agreement and, on that account, failed to exercise the right of appeal within the thirty days allowed by sec. 1849, Stats. Such facts were, upon petition to be relieved from the default, presented to the circuit court, together with affidavits tending to show that the award was very excessive and that great injustice would be done the railway company unless it could be relieved therefrom so as to permit the determination of the commissioners to be reviewed. All proceedings upon which the award was made, were regular and under judicial instructions as to the measure of damages. The only complaint made by the petitioner was that the commissioners greatly erred in the appraisement. The case on the part of the petitioner was met by an affidavit tending to show that the award was inadequate instead of being excessive. The petitioner prayed for an order setting aside the award upon the ground that the failure to appeal was the result of accident, mistake, inadvertence, surprise, or excusable neglect, and requiring a new award to be filed; also that, if the primary relief asked for could not be granted, the petitioner be granted leave to bring an action in court to set aside

the award, and for such other or further and different relief as to the court might seem proper.

The trial court decided that the failure to appeal was the result of excusable neglect on the part of the railway company's attorneys, but, nevertheless, upon the petition, the affidavits presented on both sides, and, upon all the records, documents, files, and proceedings in the matter, that the petition should be denied. This appeal is from such determination.

C. H. Van Alstine and *H. J. Killilea,* for the appellant.

For the respondent there was a brief by *Miller, Mack & Fairchild,* and oral argument by *E. S. Mack* and *Claude J. Hendricks.*

MARSHALL, J. Whether the decision complained of was grounded on want of power to relieve appellant from the failure to appeal within the time limited by sec. 1849, Stats., or in the exercise of judicial discretion because of failure of appellant to show clearly that injustice had been done by the award, does not clearly appear from the record. The concluding words of the order rather indicate that the second ground was deemed to be sufficient since the case made on behalf of appellant by the petition and supporting affidavits, was met by the judgment of the sworn commissioners and an affidavit to the effect that the award, instead of being excessive, was very inadequate. If we were to pass, in favor of appellant, the question of power to grant the petition, it would require a very strong case in its favor to warrant holding that the trial court abused its discretion in denying the application. If the question of power be resolved in respondent's favor, the other question need not be decided.

It is conceded that sec. 1849, in connection with sec. 1852, limits the time for appealing from the award of commissioners in such a matter as this to thirty days from the filing of the award. Such being the case, it seems clear that to have

granted the petition would have been, in effect, to extend the time for taking the appeal. Can that properly be done?

In considering the question suggested, we must keep in mind the elementary principle that the right of appeal is wholly statutory and so may be granted upon such terms and with such limitations as the written law may prescribe, and that if no such right is given, none exists. *Gianella v. Bigelow,* 92 Wis. 267, 65 N. W. 1030. That applies to statutory proceedings for exercise of the right of eminent domain. *State ex rel. Andrews v. Oshkosh,* 84 Wis. 548, 54 N. W. 1095; *State ex rel. R. Connor Co. v. Wallman,* 110 Wis. 312, 85 N. W. 975.

Counsel for appellant concedes that proceedings for condemnation are special, as held in *Cornish v. M. & L. W. R. Co.* 60 Wis. 476, 19 N. W. 443, and other cases, and so do not fall within the literal sense of sec. 2831, which provides that "The time within which any proceeding in an action after its commencement, except the time within which an appeal must be taken, may, before its expiration, be enlarged . . . by the court or a judge. . . . Except as aforesaid, and as otherwise specially prescribed by law, the court or a judge may also, on motion and good cause shown, in discretion and upon such terms as may be just, allow any such proceeding to be taken after the time limited by or in pursuance of the statute or by any order of court has expired."

It will be observed that power to extend the time for taking an appeal is expressly excepted from the statute; but counsel contend that such statute applies only to actions and that sec. 2832 is much broader and includes such proceedings as this, if it covers special proceedings. It provides that "The court or a judge may likewise, in discretion and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, stipulation or other proceeding against him, through his mistake, inadvertence, surprise or excusable neglect." It is difficult to see

how the mere lapse of time for taking an appeal answers to the call for "a judgment, order, stipulation or other proceeding against him." The section seems to refer to some circumstance happening before the occurrence of the thing to be relieved from, which is considered not to be the case we have to deal with.

Counsel next argue that if sec. 2832 as well as sec. 2831 applies to actions and not to special proceedings; there is no prohibition to granting such relief as that asked for and the court is free, even if it could be legislatively interfered with, to exercise its inherent power to do whatever may be necessary to prevent injustice in such judicial proceedings.

In support of the last contention of counsel, mentioned, they refer to the *Matter of City of Buffalo,* 78 N. Y. 362, and *Ladd v. Stevenson,* 112 N. Y. 325, 19 N. E. 842. The former related to a jurisdictional matter and the latter to proceedings in an action, not involving an extension of the time for taking an appeal, which we must regard this to be in the nature of.

It must be conceded that this court has held that a statute limiting the time for taking an appeal is mandatory and jurisdictional. The court has spoken many times on the matter in cases falling within the scope of sec. 2831. *Van Steenwyck v. Miller,* 18 Wis. 320; *Herrick v. Racine W. & D. Co.* 43 Wis. 93; *Hall v. Gilman,* 90 Wis. 455, 63 N. W. 1044; *Haessly v. Secor,* 135 Wis. 548, 116 N. W. 175.

The cases in this court are not grounded on the theory that a legislative prohibition of judicial extension of the time for taking an appeal is necessary to prevent it, but rather on the theory that the right of appeal being wholly statutory, whether it exists or not and all the incidents of it are referable to the written law. No right of parties to change the time for taking an appeal by consent or for the court to change the legislative plan under its inherent power, is recognized. The cases go wholly upon the principle that the legislative

creation cannot be varied by parties or the court. RYAN, C. J., speaking for the court in *Herrick v. Racine W. & D. Co.,* said: "This court has no power to amend the statute by enlarging the time" for taking an appeal. "If we had any discretion, we should assuredly exercise it in a case like this, where the right of appeal appears to have been lost by mere inadvertence." While it must be conceded that there is some judicial authority to the contrary, the doctrine of this court is in accordance with the prevailing authorities. Many might be cited of which *Burns v. Phinney,* 53 Minn. 431, 55 N. W. 540, is a good type, where the court said: "There is no authority . . . to give a party a right to appeal after the right given him by the statute has lapsed by his failure to exercise it, and to grant his application would be, in effect, giving him a right to appeal."

Such is the law as generally found stated in the works of standard text-writers, supported by abundance of authority, including our own decisions. In 2 Ency. of Pl. & Pr. 239, 244, the subject is treated thus:

"Statutes limiting the time to appeal from a decision below are mandatory and jurisdictional. They must therefore be strictly complied with; the court cannot engraft any exceptions on the statute nor admit any excuse for failure to comply with its requirements." "No court or judge can extend the statutory time for taking an appeal, except where the statute so authorizes." "The prevailing doctrine is that an appellate court cannot relieve an appellant from the effect of misfortune, accident, or mistake. Unless the statutes expressly authorize relief . . . the appellant's right of appeal lapses with the expiration of the statutory period beyond recall."

Cases are cited where some courts have held that inherent power exists to grant relief, but it seems they are out of harmony with the decisions of this court.

To set aside the award here, as a means of circumventing the statute, would be equivalent to abrogating it and giving a

new right of appeal which would be an exercise of legislative power. It does not seem that the inherent power of the court, great as it is, goes that far. In any event, the trend of our decisions is so clearly to the contrary that it is considered the legislature should be left to deal with the matter if any change is to be made.

The earnest appeal of counsel for the court to discover in the written or unwritten law some way for relief in this case by, in effect, reinstating the opportunity for appeal, has been responded to by a careful study of the matter without our being able to see how the limitation period of the statute can be directly or indirectly evaded by disturbing the award. The plain policy of the statute is that an award in such a proceeding, if not appealed from within the time afforded therefor, shall stand as a settlement of the rights of the parties. The whole proceeding being a creature of the statute, that must govern. If this leads to injustices now and then, we may well say that such is the effect of all statutes of limitations. Whether, in special circumstances, a court of equity would interfere to prevent the person in whose favor an award shall have been made from having the benefit of it, is not involved in this case. There may be such power. If so, whether it would reach such circumstances as are disclosed here we do not wish to express an opinion. If there be such power, it must be by an independent action in equity, no leave of court to commence such action is required, and the order here involved is not to be construed as foreclosing such opportunity.

By the Court.—The order is affirmed.

ESTATE OF DAVIES: KAREL and others, Respondents, vs. PERELES, Executrix, and others, Appellants.

November 17—December 7, 1915.

Executors and administrators: Title to personal property: Testamentary trusts: When title vests in trustees: Failure to qualify: Loss of trust estate: Liability of sureties on bond of executors.

1. The title to personal property of a testator vests in his personal representatives upon his death.
2. The title to the trust estate cannot vest in a testamentary trustee until the bond required by sec. 4025, Stats., has been given and filed.
3. Where the executors of a will, who were also by its terms made testamentary trustees, duly qualified as executors but failed to qualify as trustees, they could not act as trustees but continued to hold title to the estate as executors, and the sureties on their bond as executors were liable for their acts whereby the trust estate was lost.
4. Such executors never having qualified as trustees, the county court could not, by an order or decree, transfer the title to the property from them as executors to them as testamentary trustees.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

A proceeding was brought in the county court of Milwaukee county to require an accounting under the will of Robert Davies and a finding was made requiring the executors to account. From this finding an appeal was taken to the circuit court. An action was also brought in the circuit court upon the executors' bond of James M. Pereles and Thomas J. Pereles against the executors of the estate of James M. and Thomas J. Pereles, deceased, and *Ernest G. Miller* and *Fred A. Miller* as sureties upon the executors' bond, for the default of the executors under the bond involved in the county court proceeding. It was stipulated in open court that the appeal

from the county court proceeding and the action against the executors and their sureties be merged for the purpose of trial and final disposition.

Robert Davies, a resident of the city of Milwaukee, died testate in January, 1898, and his will was admitted to probate in the county court of Milwaukee on March 2, 1898. The will is long and contains many provisions. Consideration here will only be given to that portion that is concerned in this present appeal. Robert Davies gave, bequeathed, and devised all the residue of his estate, after enumerating some legacies and other payments, to Thomas J. Pereles and James M. Pereles, or to such person or persons that may be appointed in their stead, in trust to take care of and manage and to convert such parts that do not consist of money into money and to invest and reinvest at interest on notes and bonds secured by mortgage on improved real estate in the county of Milwaukee, and to receive the interest, rents, issues, and profits of all such trust estate until the 1st day of January, 1900, and one year thereafter. The will then directs to what persons and at what times payment of the net income is to be made to the year 1901. It further declares that after the year 1900, or within one year thereafter, the trustees shall distribute and set apart $40,000 as therein specified, and of this amount shall hold $12,000 for the benefit of Byron V. Davies and others, as thereinafter mentioned, and directs the distribution of the residue of the trust estate. The will directs and provides that the trustees shall manage, invest and reinvest, and receive interest, rents, issues, and profits of the $12,000 and shall pay and distribute the net income therefrom to Byron V. Davies half-yearly during his natural life; and upon his death shall pay and distribute the principal of $12,000 as follows: $2,000 to each child of Byron V. Davies, including the children of a deceased child, if any, by way of representation, living at the time of the decease of Byron V. Davies, and the remainder thereof to Walter V. Davies.

The will appoints Thomas J. Pereles and James M. Pereles as executors, who were on March 2, 1898, duly appointed as executors by the county court. The executors qualified by filing a bond in the sum of $100,000, executed by themselves as principals and by the defendants *Ernest G. Miller* and *Fred A. Miller* as sureties. Thomas J. Pereles and James M. Pereles never qualified as trustees of the estate by giving and filing with any court any trustees' bond, but held and retained such funds from the time they were appointed the executors under the last will and testament. An account was filed in the county court by James M. and Thomas J. Pereles as such executors reporting their administration of the estate of Robert Davies, and the court on February 28, 1901, allowed the account as follows: "It is ordered that the said account be and the same is hereby approved, allowed, and ordered to be recorded." On the same day the court entered thereon a decree containing the following: "It is ordered, adjudged, and decreed that the said executors hold in trust the sum of twenty thousand (20,000) dollars, . . ." of which amount they were so to hold $8,000 until the death of Franklin C. Davies and others, "and to pay and distribute the net income on the remaining twelve thousand (12,000) dollars to the said Byron V. Davies, as often as collected and practicable and not less than half-yearly, during the term of his natural life;" and upon his death to pay and distribute the principal of $12,000 as follows: $2,000 to each of the children of said Byron V. Davies, including children of a deceased child, if any, by way of representation, living at the time of the decease of Byron V. Davies, and the remainder thereof to the said Walter V. Davies. The county court also decreed: "And it is further ordered that upon the payment and distribution of the personal property hereinbefore assigned to and among the several parties thereto entitled, and upon filing with the court receipts for such payment, said estate be and the same hereby is declared to be finally settled, said ex-

ecutors as trustees be released and discharged from all further liability upon said estate."

After the entry of this final decree by the court the executors withdrew the $12,000 here in question from the two mortgages in which it was invested, as stated in their inventory, and invested it so that the entire sum was lost, and they, during their lifetime, omitted and failed to account therefor, and after the decease of said James M. and Thomas J. Pereles their personal representatives have failed to account for said sum of $12,000, except for the sum of $180.

James M. Pereles died testate in 1910 and Thomas J. Pereles died testate in 1913. Their executors are respectively *Jennie W. Pereles,* appointed and qualified to act as executrix of the will of James M. Pereles, and *Nath. Pereles, Jr.,* and *Nellie W. Pereles,* appointed and qualified to act as executors of the will of Thomas J. Pereles.

John A. Raup, one of the plaintiffs, was appointed as trustee to carry out the trust created by the will in favor and for the benefit of Byron V. Davies and his children, and he duly qualified so as to entitle him to act in that capacity.

Byron V. Davies and ten children, all of whom are beneficiaries under the trust, are now living.

Upon appeal to the circuit court in the present action the circuit court affirmed the decision of the county court and awarded judgment in favor of the plaintiffs for $11,820 with interest at six per cent. per annum from the 1st day of May, 1913, together with the costs and disbursements of this action, against *Jennie W. Pereles* as executrix of the last will and testament of James M. Pereles, deceased, *Nath. Pereles, Jr.,* as executor and *Nellie W. Pereles* as executrix of the last will and testament of Thomas J. Pereles, deceased, *Ernest G. Miller* and *Fred A. Miller,* defendants herein. From such judgment this appeal is taken.

For the appellants there was a brief by *Quarles, Spence &*

Quarles, attorneys, and *I. A. Fish,* of counsel, and oral argument by *Mr. Fish.*

For the respondents there was a brief by *Grady, Farnsworth & Kenney;* a separate brief by *Patrick W. Dean,* guardian *ad litem,* and *W. H. Timlin, Jr.,* of counsel; and oral argument by *Mr. Daniel H. Grady* and *Mr. Dean.*

SIEBECKER, J. The trial court held that the failure of James M. Pereles and Thomas J. Pereles to account for the moneys which they had received into their hands from the Robert Davies estate constituted, under the facts and circumstances shown, a violation of their duties as executors and a breach of their executors' bond. This conclusion is based on the facts as found by the court that it was the purpose, intent, and understanding of the county court, as expressed in its judgment of February 28, 1901, and of the executors and their sureties on the bond, that James M. and Thomas J. Pereles should hold the funds constituting the trust estate created by the will of Robert Davies, deceased, in their capacity as executors until the payment and distribution thereof among the persons entitled thereto under the will. Concededly no part of the fund in controversy was ever paid to any of the persons beneficially entitled thereto under the trust. It is also undisputed that no bond was ever given and no appointment was ever made by any court of these executors as trustees of the express trust created by the testator. It is the contention of the appellants that the sureties on the executors' bond are not liable for the loss of this trust fund devised to James M. and Thomas J. Pereles in trust, to hold, manage, care for, and invest and reinvest on good interest-bearing notes secured by mortgages on improved real estate in Milwaukee county for the designated beneficiaries. This claim is made on the grounds that on February 28, 1901, the county court ordered that the executors' accounts be approved and allowed, and on that day also by decree directed the

executors to administer the trust fund as prescribed in the will. It is urged that this action of the court operated to terminate the duties of the executors and to discharge the bond, and, further, that if it be held that this decree did not terminate the duties of the executors and discharge their bond as such, then the loss of the trust fund by the executors is attributable to their acts of mismanagement in their attempted execution of the duties of the testamentary trustees under the direction of the court, and the sureties on the executors' bond are therefore not liable for their default in the matter.

The defense rests on one of the two grounds: either that the duties of the executors did not persist after the entry of the county court's decree on February 28, 1901, or that before the termination of their executorship they erroneously assumed to perform the duties of such trustees under the direction of the county court without qualifying for the office.

It appears that the testator nominated and the court appointed the executors, who duly qualified. They were also made the trustees by the will to carry out the testamentary trusts. They returned an inventory of decedent's estate and received and took possession thereof as executors. They filed an account as executors, and petitioned the county court stating that they had administered the estate, prayed judgment that the account be allowed and that the residue of the estate in their hands be assigned. Upon due notice the account was examined and an order made by the court that the account be approved, allowed, and ordered to be recorded. The court rendered a decree on the day it approved and allowed the account which recites that the personal property of the estate remains in the hands of the executors as trustees for distribution, and thereupon ordered, adjudged, and decreed "that the said executors hold in trust the sum of twenty thousand (20,000) dollars" and to pay and distribute the net income of $12,000 thereof to Byron V. Davies during his

natural life, and at his death distribute the principal as directed by the will. The executors under their executorship held the title to this personal property. It is well established that the title to personal property of the testator vests in his personal representatives. *Stehn v. Hayssen,* 124 Wis. 583, 102 N. W. 1074; *Schinz v. Schinz,* 90 Wis. 236, 63 N. W. 162; *Palmer v. O'Rourke,* 130 Wis. 507, 110 N. W. 389; *Estate of Kirkendall,* 43 Wis. 167. A testamentary trustee, under the provisions of sec. 4025, Stats. 1913, in order to qualify as such trustee is required to give bond to the county judge having jurisdiction of the probate of the will, and the title to the trust estate cannot vest in the testamentary trustee until the proper bond required by this statute has been given and filed. *Schinz v. Schinz, supra; McWilliams v. Gough,* 116 Wis. 576, 93 N. W. 550; *Wallber v. Wilmanns,* 116 Wis. 246, 93 N. W. 47. In the *Schinz* and *McWilliams* cases the executors who qualified and received the estate into their hands as executors were also testamentary trustees, and the court held that the title to the trust estate remained vested in the executors until they qualified as testamentary trustees. In the *Gough Case* it is said:

"The statute (sec. 4025, Stats. 1898) obviously contemplates qualification of a testamentary trustee before his office as such shall commence, imposing upon him active duties. The formal assignment in this case of the property to the Goughs as testamentary trustees did not operate to change the title to the property. It was in them before the order, and it remained in them after that, no trustee having been appointed in their stead, notwithstanding they failed to qualify. Obviously, therefore, before a testamentary trustee has any active duties to perform, he must accept the trust in the manner contemplated by the statute, namely, by giving a bond as required by sec. 4025, Id."

So in the instant case, in default of the executors qualifying as testamentary trustees they could not assume to perform any duties as trustees and they held the estate as ex-

ecutors, and, as stated, if the court by decree formally attempted to assign it to them as testamentary trustees on February 28, 1901, such action of the court did not operate to change the title to the property from them as executors to that of testamentary trustees, because they had not qualified as trustees. The decree of the county court plainly indicates, however, that the county court did not thereby undertake to transfer the title of the property from them as executors and to them as testamentary trustees. We regard the cases of *Newcomb v. Williams,* 9 Met. 525, cited in the *Schinz Case,* and *Cluff v. Day,* 124 N. Y. 195, 26 N. E. 306, to be in harmony with the cases in this court and as supporting the holding of the lower court in the instant case. The circuit court properly held that the executors' bond in this case is not discharged.

By the Court.—The judgment appealed from is affirmed.

TIMLIN, J., took no part.

CITY OF MENASHA, Respondent, vs. WISCONSIN TRACTION, LIGHT, HEAT & POWER COMPANY, Appellant.

November 18—December 7, 1915.

Public utilities: Taking of plant by municipality: Action to determine necessity: Judgment: Appeal.

1. In the action, provided for in sec. 1797*m*—80, Stats. 1913, to obtain an adjudication as to the necessity of the taking by a municipality of the existing plant of a public utility, no judgment is provided for or contemplated, and no appeal lies from the verdict of the jury or the finding of the court; nor, if a judgment be in fact entered, can an appeal be taken therefrom.
2. Where there is jurisdiction in the trial court, sec. 2836*a*, Stats. 1915 (ch. 219, Laws 1915), is limited to curing defects in an appeal only in a matter, action, or proceeding in which an appeal is authorized by statute.

APPEAL from a judgment of the circuit court for Winnebago county: BYRON B. PARK, Judge. *Dismissed.*

The city of *Menasha* pursuant to sec. 1797*m*—80, Stats. 1913, brought an action in the circuit court to determine the necessity of taking the public utility plant of the defendant located in the plaintiff city. The jury found that public necessity existed for its taking and the court entered a judgment in accordance with the verdict, from which judgment the defendant appealed.

For the appellant there were briefs by *Van Dyke, Shaw, Muskat & Van Dyke,* and oral argument by *James D. Shaw.*

For the respondent there was a brief by *D. K. Allen,* attorney, and *Silas Bullard* and *John C. Thompson,* of counsel, and oral argument by *Mr. Allen* and *Mr. Thompson.*

VINJE, J. Plaintiff maintains that an appeal does not lie from the judgment or the finding of the jury. Sec. 1797*m*—80, Stats., provides that if a municipality shall, according to law, have determined to acquire an existing plant of a public utility, it shall bring an action in the circuit court praying the court for an adjudication as to the necessity of taking. Summons, complaint, and answer shall be served, and the action shall stand for trial and be tried to a jury unless waived. The language of this section standing alone seems to contemplate an action that shall proceed to judgment. But taken in connection with the next section and the whole scheme of condemnation it seems quite clear that the legislature intended the proceeding in court to stop with the verdict, or, in case of a trial by the court, with its finding. Sec. 1797*m*—81 provides that if the jury shall have found that a necessity exists for the taking of a plant, then the municipality shall give speedy notice of such verdict of a jury to the public utility and to the commission, and the following sections require the commission to proceed to determine the compensation. The statute nowhere mentions a judgment. If one were to be entered the verdict would be merged in the

judgment, and notice of the latter would be required and not of the verdict. Though the statute does not in terms so provide, it is obvious from its scheme that if the question of necessity is tried by the court notice of its finding thereon must be given in the same manner as of a verdict. The entry of a judgment upon the verdict in this case is an irregularity that does not affect the validity of the finding.

An appeal does not lie from a mere verdict of a jury or a finding of fact by the court and so sec. 3047 does not apply. But, irrespective of this, the verdict of the jury is but one step in the condemnation proceeding. There must be a vote on the question by the municipality, a finding of necessity by a jury or the court, and compensation fixed by the commission before the proceeding terminates. As pointed out in *Clancy v. Fire & P. Comm'rs,* 150 Wis. 630, 633, 138 N. W. 109, the absence of any provision for an appeal is quite significant, because in somewhat cognate statutes, there referred to, the legislature has specifically provided for an appeal. The right of appeal being purely statutory; none having been expressly given, and the whole legislative scheme of condemnation apparently negativing the idea that the proceeding should halt at an intermediate step for the purpose of an appeal, it must be held that none was intended. Ch. 219, Laws 1915, to which our attention is called by defendant, does not touch the question. Where there is jurisdiction in the trial court, as there was here, that section is limited to curing defects in an appeal only in a matter, action, or proceeding in which an appeal is authorized by statute. It does not grant an appeal where none is given.

By the Court.—Appeal dismissed.

ESTATE OF DE ROY: FLEMMING and others, Respondents, vs. GRIEM, Administrator, Appellant.

November 18—December 7, 1915.

Wills: Construction: Death of legatee before making of will.

A testator having bequeathed certain legacies to persons residing in Germany whom he had not seen or corresponded with for more than twenty years, and having, by a clause applicable only to this class of legatees, provided that "in case of the death of either" of such legatees her legacy "shall be payable to the legal heir or heirs of such legatee," it is *held* that such clause was intended to apply to death of a legatee either before or after the making of the will.

APPEAL from a judgment of the circuit court for Calumet county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

This was a proceeding begun February 5, 1910, in the county court of Calumet county by Jacob Severin, executor of the will of De Roy, praying for the construction of certain portions of De Roy's will. On the same day Severin filed his final account, which showed a balance in his hands of $14,877.01 after paying all debts and expenses of administration.

The clauses of the will of which construction was prayed were the following:

"3. I give, devise and bequeath to my cousin Amalia Hinsch of Hamburg, in Germany, the sum of $1,500.

"4. I give, devise and bequeath to *Wilhelmine Otten* of Hamburg, in Germany, the daughter of my cousin Wilhelmine Meyer (*née* Bichels), the sum of $1,500.

"5. I give, devise and bequeath to Olga Pracht of Hamburg, in Germany, daughter of my cousin Auguste Reinbold (*née* Bichels), the sum of $1,500.

"In case of the death of either or any of the five legatees above named, the legacy hereby bequeathed to them or either of them, by this my last will, shall be payable to the legal heir or heirs of such deceased legatee."

It appeared that De Roy, a resident of Calumet county for more than twenty years, made his will April 26, 1909, and died May 20th following; that the legatees named in the disputed paragraphs of the will were relatives living in Germany with whom he had no correspondence and whom he had never visited; that Amalia Hinsch died without issue June 29, 1906; that Olga Pracht died July 10, 1897, leaving one child named *Elfriede Pracht* surviving; that the name of the person called *Wilhelmine Otten* in the fourth paragraph was really *Wilhelmine Flemming.* The county court found that the legacy to Amalia Hinsch lapsed by reason of her death without issue; that the bequest to *Wilhelmine Flemming* (under the name *Otten*) was valid; and that the bequest to Olga Pracht would descend to her daughter, *Elfriede Pracht,* on proof that said *Elfriede Pracht* was still alive, leave being given to make proof of that fact.

The executor appealed to the circuit court from those parts of the judgment in favor of *Wilhelmine Flemming* and *Elfriede Pracht,* and said last named legatees appealed from that part of the judgment declaring the legacy to Amalia Hinsch lapsed and directing that the same go into the residuary estate.

Before the appeals came to trial Severin died testate, having named the appellant, *Griem,* his executor, and *Griem* qualified as such in November, 1911. The Severin estate was inventoried at $14,560. In March, 1912, *Griem* was appointed administrator *de bonis non* of the estate of De Roy and qualified as such. In September and October, 1912, the appeals were revived and continued in the circuit court on the application of *Griem* as administrator *de bonis non.* The appeals were tried in the circuit court in March, 1914, and that court held that the bequest to *Wilhelmine Flemming* was valid; that the bequest to Olga Pracht was valid and passed to *Elfriede Pracht,* her daughter and only heir; that the bequest to Amalia Hinsch did not lapse but passed to *Wilhel-*

mine Flemming, her only heir at law; that it was the intention of the testator to direct that if any of the legatees named in the paragraphs in question were dead at the time the will was made or should die later, in either case the legacy of the deceased legatee should not lapse, but pass to the legal heirs of such legatee. The judgment directed that the administrator *de bonis non* pay over the legacies (less the inheritance tax in each case) in accordance with the findings. Motion was afterwards made by the administrator to modify the judgment so that the same should not be a personal judgment against him, but only that the legacies be paid out of the moneys in his hands belonging to the estate of De Roy. This motion was based on affidavits showing that the administrator received from the De Roy estate $3,000 and no more. By affidavits filed in opposition it appeared that upon settlement of the Severin estate *Griem* had in his hands a considerable sum of money and was directed by the county court to retain in his hands out of said moneys $1,618.75 to pay the costs and expenses of said appeals and discharge the legacies in the De Roy will proportionally.

On this motion the judgment was modified so as to direct that the legacies be paid out of the estate of De Roy and out of the $1,618.75 reserved as aforesaid, or so much thereof as may be applicable thereto and necessary therefor. From this judgment the administrator appeals.

J. E. McMullen, for the appellant.

For the respondent there was a brief by *L. P. Fox,* attorney, and *Rubens, Fischer, Mosser & Barnum,* of counsel, and oral argument by *Mr. Fox* and *Mr. H. Barnum.*

WINSLOW, C. J. A number of detail errors are alleged, all of which have been examined and found untenable. It is not considered that any good purpose would be subserved by stating them. The only question of fact or of law in the case worthy of discussion is the question as to the meaning of that

clause of the will which provides that in case of the death of either of the legatees her legacy "shall be payable to the legal heir or heirs of such legatee."

Does this include legatees who had died prior to the making of the will? The circuit court answered this question in the affirmative under the peculiar circumstances of this case, *i. e.* the circumstances that the legatees named lived in Germany, had not been visited by the testator in more than twenty years, and apparently had never been in correspondence with the testator.

The trial court thought that these facts made it clear that the clause so industriously inserted in the will and applicable only to this class of legatees was meant to cover death either before or after the making and thus provide for all contingencies.

We agree with this construction. The intent of the testator to be gathered from the will itself in the light of the surrounding circumstances is, of course, controlling. This principle needs no citation of authorities in its support.

By the Court.—Judgment affirmed.

LANDS OF CHRISTIANSON: MILLER and another, Appellants, vs. HART, Respondent.

November 18—December 7, 1915.

Descent of real property: Homestead: Vesting of estates.

Under sec. 2270, Stats., providing generally for the descent of real property, and sec. 2271, providing that a homestead not lawfully devised shall, if the owner leave a widow and issue, descend "to his widow during her widowhood and upon her marriage or death to his heirs *according to the next preceding section*," the heirs take at the death of the owner a vested estate, subject to the conditional life estate of the widow.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

Proceedings to determine the descent of the homestead of Louis Christianson under sec. 2271, Stats., as it existed in 1889.

Louis Christianson died intestate, leaving a widow and issue. Proceedings were commenced in the county court to determine whether the heirs of the intestate, at his decease, inherited the homestead subject to the interest of the widow. The decision was in favor of such heirs. On appeal to the circuit court the decision was affirmed. This appeal is from the judgment accordingly rendered.

For the appellants there were briefs by *Hooper & Hooper,* and oral argument by *Ed. M. Hooper.*

In support of the judgment of the circuit court there was a brief by *Williams & Williams,* as *amici curiæ,* and oral argument by *Geo. E. Williams.*

MARSHALL, J. Sec. 2270, Stats., when the right in question arose, provided for the descent of real estate of intestates, except as provided in the succeeding section which dealt with the descent of homesteads. The same is true of the statutes now. Sec. 2271 then was and now is as follows:

"When the owner of any homestead shall die, not having lawfully devised the same, such homestead shall descend, free of all judgments and claims against such deceased owner or his estate except mortgages lawfully executed thereon and laborers' and mechanics' liens, in the manner following:

"(1) If he shall have no lawful issue, to his widow.

"(2) If he shall leave a widow and issue, to his widow during her widowhood, and upon her marriage or death to his heirs according to the next preceding section.

"(3) If he shall leave issue and no widow, to such issue according to the preceding section.

"(4) If he shall leave no issue or widow, such homestead shall descend under the next preceding section, subject to lawful liens thereon; provided, however, if there be no widow

or minor child of such deceased owner of any homestead living at the time of his death such homestead shall be subject to and charged with the expenses of his last sickness and of his funeral and the costs and charges of administration; and provided further, that if there be no widow and no child and no child of any deceased child of such deceased owner of any homestead such homestead shall be subject to all the debts and liabilities of such deceased owner."

As indicated in the statement, the question at issue here is whether, when a person dies intestate, leaving a widow and issue, his heirs take a vested estate, or the whole estate goes to the widow during her life or widowhood, and upon her remarriage, if such event occurs, or her death, it then vests in the heirs of the intestate living at that time. The latter is contended for, mainly because of the use of the words in the second subdivision of sec. 2271, "upon her marriage or death." It is argued that such language indicates that the whole title vests in the widow until the happening of one of the events mentioned and that then, and not until then, does the interest over vest and, so, must be held to go to the then living heirs of the intestate.

It seems, as contended by counsel in opposition to the foregoing proposition, that due significance is not given to the words "according to the next preceding section." That indicates that the heirs existing at the death of the testator take the estate subject to the right of the wife during her life or widowhood. We are safe in saying that for around half a century such has been understood to be the legislative intent. The matter has not been particularly considered here, but decisions have been made upon the theory that such is the meaning of the statute. In *Ferguson v. Mason,* 60 Wis. 377, 387, 19 N. W. 420, without the matter being particularly discussed, the court held that at the death of an intestate, leaving a homestead, a widow, and issue "a life estate descends to his widow, on condition subsequent that she does not marry, and the reversion only remains in the heirs of the deceased

husband." The word "remains," quite clearly indicates that the idea of the court was that the heirs of an intestate, existing at his death, then take title to the reversion, but with enjoyment of possession postponed until termination of the conditional life estate; that the two estates—the widow's conditional life estate and the estate in remainder—vest at the same time, to wit, at the date of the death of the intestate. In the late case of *Lands of Sydow,* 161 Wis. 325, 154 N. W. 371, the decision went upon the theory that the homestead of the intestate descended immediately upon his death, as indicated in *Ferguson v. Mason.*

It is considered that, not only is the proposition before us practicably ruled in favor of the decision complained of by the decisions of this court to which we have referred; but that the administration of the statute has been in accordance therewith so long as to render the meaning suggested a firmly settled rule of property. As an original proposition, when sec. 2271 is read in connection with the preceding section, it pretty plainly provides for the descent of the whole title to the homestead at the death of the intestate owner, he leaving a widow and issue; a conditional life estate to the widow and the reversion to the intestate's then living heirs.

We have not overlooked any of the decisions cited to our attention to which particular reference herein has not been made. None of them seem to have any helpful bearing on the question presented.

By the Court.—The judgment is affirmed.

SUTTER, Administrator, Respondent, vs. MILWAUKEE BOARD OF FIRE UNDERWRITERS, Appellant.

November 18—December 7, 1915.

Municipal corporations: Charitable corporations: Board of fire underwriters: Liability for negligence of employees.

1. A municipal corporation, as it exists in this state, is a body corporate consisting of the inhabitants of a designated area, created by the legislature, with or without the consent of such inhabitants, for governmental purposes, possessing local legislative and administrative power and power to exercise within such area so much of the administrative power of the state as may be delegated to it, and possessing limited capacity to own and hold property and to act in purveyance of public conveniences.
2. A board of fire underwriters incorporated pursuant to sec. 1922, Stats., is not a municipal corporation, and is liable for negligent acts of members of a fire patrol, established and controlled by it, in performing the duties of such patrol.
3. Such a board is not a charitable corporation nor a business corporation performing charitable duties as to which the rule of *respondeat superior* does not apply. Effort made or work done in furtherance of private interest does not become charity because such effort or work at the same time promotes the public interest.
4. A private corporation acquires no immunity from liability for the acts of its employees when such acts are performed under its direction in aid of its private interest, although the services performed might be governmental if performed by a municipal corporation and by a public officer.

APPEAL from an order of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

For the appellant there were briefs by *Quarles, Spence & Quarles,* attorneys, and *I. A. Fish,* of counsel, and oral argument by *Mr. Fish.*

For the respondent there was a brief by *Otjen & Otjen,* and oral argument by *Henry H. Otjen.*

TIMLIN, J. To a complaint averring that the defendant is a corporation organized and existing under and by virtue

of ch. 146, Laws 1872, ch. 73, Laws 1878, and secs. 1923, 1924, 1925, R. S. 1878, and containing by attached exhibits the articles of incorporation, by-laws, and rules of the defendant, and also an averment in sufficient form that one of defendant's employees, in discharge of the duties of such employment, negligently caused the death of plaintiff's intestate, the defendant demurred. The demurrer was overruled, and this appeal from the order followed.

Sec. 1922, Stats., authorizes any three or more agents or underwriters, lawfully doing the business of fire insurance in any city, to become incorporated as a board of underwriters under the general incorporation laws of this state for the usual purposes for which such boards are established. This board is permitted to establish a fire patrol in any city wherein it is located. The patrol is under the control of the board. It is made the duty of the patrol "to discover and prevent fires and to save and preserve life and property at and after fires." The patrol has the right to enter any building on fire or which may be in danger of taking fire from other burning buildings; subject to the control of the chief of the fire department of the city. The corporation may impose an assessment on its members to pay the expenses of maintaining said patrol. Secs. 1923, 1924, 1925, Stats. The defendant is such a corporation.

The first contention of appellant's counsel is that defendant is a municipal corporation. The argument in support of this is more erudite and interesting than convincing. It should be borne in mind that the meanings of words change with time. Archaic definitions, except when they relate to obsolete words or words from dead languages, which words are no longer in popular use, are of little value in arriving at the meaning of modern statutes, and such definitions may be very misleading. A municipal corporation in Wisconsin today is of the kind mentioned in art. XI of our constitution. The words now mean a body corporate consisting of the in-

habitants of a designated area, created by the legislature, with or without the consent of such inhabitants, for governmental purposes, possessing local legislative and administrative power, also power to exercise within such area so much of the administrative power of the state as may be delegated to it, and possessing limited capacity to own and hold property and to act in purveyance of public conveniences. It seems obvious that the defendant is not such a corporation.

The defendant further contends that if the corporation is not a municipal corporation it is a charitable corporation and therefore not responsible for the negligence of its servants in carrying out the public duty of saving life and property at a fire. It is to be observed, however, that only persons who have, directly or as representatives of others, a pecuniary interest in saving property and in preventing the spread of fire, are eligible as members of this corporation. Their work and that of their servants, while it advances their private interest, also advances the public interest. This is not an unusual concomitant of selfish acts, as a little reflection will show. The defendant is clearly not a charitable corporation, because it is not organized under ch. 91, Stats. 1913, which provides for the organization of charitable corporations. Corporations whose functions are apparently charitable may also, it is true, be organized under sec. 1771, Stats. Neither is it a business corporation performing charitable duties. This corporation is not interested in saving life, but, apparently in order to harmonize its efforts with that of the regular fire department and prevent any conflict of interest or duty, the statute imposes duties upon the patrol mentioned similar to those imposed upon the regular fire department of the city. Effort made or work done in furtherance of private interest does not become charity because such effort or work at the same time promotes the public interest. Charity has been many times defined since Saint Paul gave his world-famous definition to the Corinthians, but no definition yet at-

tempted, we think, includes the work, in his own interest, of the great inventor, the eminent physician, or the corporation (sec. 1494, Stats.) for the prevention of horse stealing, or the work of the incorporated detective agency. Even a municipal corporation, when engaged in the performance of duties not governmental, is responsible for the negligence of its servants. *Piper v. Madison,* 140 Wis. 311, 122 N. W. 730; *Weisenberg v. Winneconne,* 56 Wis. 667, 14 N. W. 871; *Mulcairns v. Janesville,* 67 Wis. 24, 29 N. W. 565.

A municipal corporation loses its immunity from liability for the acts of its servants when it engages in other than governmental duties, and a private corporation acquires no such immunity when it engages in a duty through a servant employed by it and under its direction in aid of its private interest, although the service performed might be governmental if performed by a municipal corporation and by a public officer. *Ill. S. Co. v. Novak,* 184 Ill. 501, 56 N. E. 566; *S. C.* 84 Ill. App. 641; *Dickson v. Waldron,* 135 Ind. 507, 524, 34 N. E. 506, 35 N. E. 1, 24 L. R. A. 483; *King v. Ill. Cent. R. Co.* 69 Miss. 245, 10 South. 42; *St. Louis, I. M. & S. R. Co. v. Hackett,* 58 Ark. 381, 24 S. W. 881. Looking at the question from the viewpoint of precedent and authority, a corporation like the defendant has been held liable *respondeat superior* in *Newcomb v. Boston P. Dept.* 151 Mass. 215, 24 N. E. 39; *Bates v. Worcester P. Dept.* 177 Mass. 130, 58 N. E. 274, and *Coleman v. Fire Ins. Patrol,* 122 La. 626, 48 South. 130; all of which were cited in the elaborate opinion of the learned circuit judge given in support of his decision overruling the demurrer in this case. The following cases apparently announce a contrary doctrine: *Fire Ins. Patrol v. Boyd,* 120 Pa. St. 624, 15 Atl. 553, 1 L. R. A. 417; *Cole v. Fire Engine Co.* 12 R. I. 202; *Wood v. Quimby,* 20 R. I. 482, 40 Atl. 161. We think the better reason is with the Massachusetts and Louisiana cases.

By the Court.—Order affirmed.

HILTON and another, Executors, Respondents, vs. RAHR and wife, Appellants.

November 19—December 7, 1915.

Gifts inter vivos: *Evidence: Competency: Self-serving declarations: Invalid will: Transfer of note by parol: Mistake of trial court as to law: Appeal: Findings presumed to rest on competent evidence only: Witnesses: Competency: Transactions with person since deceased.*

1. Self-serving declarations, whether oral or written, not part of the *res gestæ*, are incompetent.
2. Declarations of a donor after a gift and in derogation of it are incompetent to disprove the gift.
[3. Whether, when the alleged acts and words of a gift are so ambiguous that the transaction might be either a gift or a bailment, declarations of the alleged donor contained in an abortive attempt by him to make a will or codicil are competent as verbal acts and part of the *res gestæ*, not decided.]
4. Oral comments by the trial judge, in deciding the case, upon the informality of a transaction by which, it was claimed, without any written transfer a father made a gift to his son of a note for a large amount executed by the son and secured by a mortgage, are *held* not to show that the judge believed the evidence insufficient in law to support a gift or that his finding against a gift was based upon an erroneous view of the law.
5. Where there is competent evidence sufficient to support a finding by the trial court, this court will presume, in the absence of an affirmative showing to the contrary, that such finding rests upon the competent evidence solely.
6. The question being as to whether a deceased father had in his lifetime made a certain gift to his son, the son was not competent to testify as to transactions or communications personally had with the father concerning which no witness had been examined in behalf of the opposite party.
7. In such case, where the son had been examined under sec. 3825, Stats., at the instance of the father's executors, his testimony then given was not admissible in his behalf.

APPEAL from a judgment of the circuit court for Winnebago county: CHESTER A. FOWLER, Judge. *Affirmed.*

The plaintiffs were the executors of the will of Charles Rahr, Sr.

For the appellants there was a brief by *Charles Oellerich,* attorney, and *Thompson, Thompson, Allen & Gruenewald,* of counsel, and oral argument by *Mr. J. C. Thompson* and *Mr. Oellerich.*

For the respondents there was a brief signed by *Bouck, Hilton, Kluwin & Dempsey;* a separate brief by *P. H. Martin,* of counsel; and oral argument by *Mr. Martin* and *Mr. E. J. Dempsey.*

TIMLIN, J. The executors respondent brought this suit to foreclose a mortgage executed by the appellants to Charles Rahr, Sr., and had judgment of foreclosure and sale for a sum due, a sum to become due, solicitor's fees, and costs. The appellants defended the foreclosure suit on the ground that the mortgagee, Charles Rahr, Sr., had prior to his death and in the month of August, 1911, made a gift of the note secured by this mortgage to his son, the appellant *Charles Rahr, Jr.* Appellants contend that the trial court erred in finding against such gift, and that the latter finding rests in some essential particulars upon an erroneous view of the law and upon incompetent evidence.

Immediately prior to the alleged gift the relations of the parties were such that the appellant *Charles* owed his father upon the note in suit $38,500, bearing interest at four per cent. per annum. This note was secured by mortgage on the brewery property. The son was paying interest to the father on this note at the rate of $30 per week, and the note was carried on the books of account of the son among bills payable as a liability. The father had other notes and mortgages belonging to the son which the former held as collateral to the note for $38,500. The family of the father consisted of his son, six daughters, and his wife, the mother of these children. On the day in question in August, 1911, the father was engaged in bringing to the office of his son in the brewery, not as a gift but as a business transaction, certain other notes and

mortgages and abstracts. He handed over the bundle of papers to the son without comment. Taking the papers, the son found among them the note in question, and, speaking German, called his father's attention to it and received a reply as follows: "Pa, hier ist die note du gagen mir hatte on die brauerei." The father answered: "Das ist deins, behalte es." The witness translates this: "Pa, here is the note you have against me on the brewery property." "That is yours, keep it." Nothing more was said by either father or son. There is some variance in detailing the exact expressions used, but nothing was said more strongly indicative of a gift than the foregoing. The note had indorsed on the back the following statement in the father's handwriting: "April 1st, 1910. Settled balance thirty-eight thousand five hundred." The son put the note away with his private papers and kept it until after the death of his father, which occurred on November 30, 1913. The father died testate leaving a will dated May 4, 1908. The will recited that no provision was made therein "for my son, *Charles Rahr,* because in my lifetime I have transferred to him my brewery business at a value much less than its real worth and which took into consideration his share of my estate." Evidence was offered tending to corroborate the truth of this recital. The indorsement on the note was explained by the fact that on the date mentioned it was ascertained that the balance due on the note, which was originally for $57,000, had been reduced by payments made by the son to $38,500. Among the papers of the father after his death, inclosed in a sealed envelope indorsed "My last will, to be opened after my death," was found a paper in the handwriting of deceased in words and figures following:

"Oshkosh, September 19, 1912.

"Today I have to change my last will, deposited with *Geo. Hilton.* I guess made in the year 1908. My daughter, Anna Sternberg, shall have her full share with my other

daughters, of my money, provided she promises never to live with her husband, Alfred Sternberg, again nor let him have any assistance, because he swindled me out of thirteen thousand dollars. My wife's money, thirty-eight thousand five hundred dollars, is on interest with my son *Charley,* secured by a mortgage on his property although made in my name, belongs to my wife. *Charley* has his full share of my and my wife's money, and promised not to claim anything after our deaths. After my death, the girls may divide what is left, share and share alike.

"CHARLES RAHR, Sr." (Seal.)

This paper is referred to as Exhibit C.

There was some other evidence on the part of defendants tending in some degree to corroborate the claim that there was a gift. Exclusive of evidence challenged as incompetent there was, on the part of the plaintiffs, evidence tending to show that after the date of the alleged gift the son continued to carry this note in his bills payable account, and to pay interest thereon as before the gift; that he made verified reports to the federal and state income tax officers in which he listed this note as an outstanding debt; he made no attempt to get back his collateral or to get the mortgage securing the note, or to get a satisfaction of the mortgage; he told no one of his good fortune, not even his wife; he renewed fire insurance on the brewery, the policies containing a provision: "Loss payable to Charles Rahr, mortgagee, as his interest may appear." When he heard his father's will read he was, or affected to be, much dissatisfied because he was not provided for in some way, and he made no claim that there was a gift to him. He consented to probate of the will and waiver of notice, and being shown Exhibit C he still made no claim that there had been a gift. As late as January, 1914, he said to *Mr. Hilton,* one of the executors of the will, that if his father had only given him a diamond he would have been satisfied, and on a prior occasion after the death of his father he said to his sister, "He was no father to me, he was my worst enemy. He gave people like Sternberg and Mrs. Long anything for the

asking, but what did he give me, nothing but a few hundred dollars at the time I was married." It would serve no good purpose to pursue this branch of the subject further. There was evidence of unquestioned competency sufficient to support the findings.

The learned circuit judge in deciding the case commented orally upon the informality of this large transaction and the absence of any written transfer to the son. It is argued that these remarks indicate a belief by the circuit judge that the evidence on the part of the defendants was insufficient in law to support a gift. We cannot bring ourselves to the conviction that this contention is sound.

It is next argued that the court undoubtedly gave weight to Exhibit C and that this writing was incompetent. We all recognize that self-serving declarations, whether oral or written, not part of the *res gestæ,* are incompetent, and that declarations of a donor after a gift and in derogation of that gift are incompetent. But a majority of the court consider it unnecessary to pass upon the question: when the alleged acts and words of gift are so ambiguous that the transaction might be either a gift or a bailment, whether declarations of the alleged donor contained in an abortive attempt by him to make a will or codicil are competent as verbal acts and part of the *res gestæ.* It is considered that there is nothing in the record to show that the trial judge gave any weight to Exhibit C beyond the fact that the son, when confronted with that declaration of his father, made no claim that there had been a gift to the former. It is believed, therefore, that the case is governed by the rule that, where there is competent evidence sufficient to support a finding, this court will presume, in the absence of an affirmative showing to the contrary, that that finding rests upon the competent evidence solely.

The majority of the court, therefore, declines to commit the court on the question of competency of Exhibit C, although the writer considers it competent under the circum-

stances here shown. We discover no error in excluding the testimony of *Charles Rahr, Jr.,* relative to transactions or communications personally had with his deceased father on or about April 1, 1910, or in August, 1911.

Although the plaintiffs questioned witnesses in this action with reference to other transactions or communications between the appellant and his father, deceased, no witness was examined in their behalf concerning the communications of April 1, 1910, or August, 1911. Sec. 4069, Stats. 1913; *Anderson v. Anderson,* 136 Wis. 328, 117 N. W. 801. In a different proceeding under sec. 3825, Stats. 1913, the defendant *Charles* was examined at the instance of the executors under oath. On the trial of this action defendants offered in evidence the testimony of *Charles* so given. It was properly excluded, we think, under the rule of *Maldaner v. Smith,* 102 Wis. 30, 78 N. W. 140.

By the Court.—Judgment affirmed.

BARTLETT, Appellant, vs. DOYLE, Respondent.

November 19—December 7, 1915.

Real-estate brokers: Commissions: Exclusive agency: Assent to contract: Evidence: Sufficiency: Questions for jury.

The question being whether plaintiff's modified contract of agency to sell defendant's farm was for an exclusive agency, plaintiff testified that, after the parties had agreed upon certain modifications of the original contract, he said to defendant that it was understood that he (plaintiff) was to have an exclusive contract as before, and also said they ought to have something in writing to show what the contract was, to which defendant replied that it was not necessary to have it in writing and that his word was as good as his bond. *Held,* that such testimony, if true, established an exclusive agency, since it showed that defendant assented as well to the exclusive part of the contract testified to as to any other part; and it was error, therefore, to take the question from the jury on the ground that there was no evidence of an exclusive agency.

APPEAL from a judgment of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

Action to recover commission on an alleged exclusive contract for the sale of real estate.

The cause was submitted to the jury on a special verdict of two questions. In answer to the first they found plaintiff was not the procuring cause of the sale. Upon the second question, whether defendant gave plaintiff an exclusive agency for the sale of his farm, they were unable to agree, and the court finally directed them to answer it in the negative on the ground that there was no evidence of an exclusive agency. From a judgment dismissing the complaint the plaintiff appealed.

For the appellant there was a brief by *Kopp & Brunckhorst,* and oral argument by *Arthur W. Kopp.*

For the respondent the cause was submitted on the brief of *Geo. B. Clementson* and *T. J. Fitzpatrick.*

VINJE, J. It was conceded upon the trial that defendant's farm was sold by an agent other than plaintiff within the time of the exclusive agency, if there was one. Defendant also concedes that if plaintiff had an exclusive agency he would be entitled to recover though he was not the procuring cause of the sale. This leaves for determination the sole question whether there was sufficient evidence of an exclusive agency to carry that issue to the jury. Plaintiff asserts and defendant denies that the original contract entered into between them gave him the exclusive right to sell the farm. Such contract was for a commission of $300. He worked under that for a while and then secured a modification of it because the commission was inadequate, and the question is, Was this modified contract one for an exclusive agency? Upon this subject plaintiff's testimony is as follows:

"We got out of the car and *Doyle,* Cullen, and myself walked up onto the porch. I said to him I wanted to see him about the farm, and he said all right and we sat down on the

porch. I told him that I couldn't afford to handle the farm on the basis that I had it. That it was hard to enlist the services of other real-estate men upon that basis, because there was nothing to split with them; the time we split $300 there was nothing in it for any other agent, and that I wanted to make other arrangements with him if possible for more money in case of a sale. *Doyle* asked what I wanted and I said that two per cent. on a farm—on any farm—was regular; but on a farm as rough as his farm and as large, hard to sell, that a man ought to have $5 an acre. He said he would not give it to me. 'Well,' I said, 'what is the matter with holding the farm—or you accepting $95 an acre net and allow me all that I can get over. If I can get $100 an acre the $5 is mine. That is, whatever I can get over is mine.' And he said, 'Well, I don't know, I will see.' And he went into the house, presumably to talk to his wife, because he said 'I will talk it over with my wife,' and he came out in a few minutes and said 'We will do that.' I wouldn't say whether his wife came back with him, but I think she did. And I told him that it was understood that I had the exclusive agency the same as before and that he had to hold it at $100 an acre and send all purchasers to me; if there was any cutting in the price to be done that I would do it, but I told him that I would not hold for $100 an acre if I had an offer of anything over $95 and couldn't do any better that I would sell the farm, before January 1st, as he said it would have to be sold before January 1st, 1915, or he would have to make other arrangements, he would have to know what he could do. And I said to him, 'We ought to have something in writing to this effect,' and he said, 'It isn't necessary to have this in writing with me. My word is as good as my bond.' I said, 'Cullen, you heard the agreement.' He said 'Yes.' "

Cullen, who drove plaintiff to defendant's house and who was present during the conversation, corroborates plaintiff as to what was said.

Relative to the testimony of the plaintiff the court instructed the jury: "Now I charge you now on this testimony, that, taking the testimony of *Bartlett* as being absolutely true, it does not prove an exclusive agency to sell this land." Er-

rors are assigned because the court so instructed the jury and because he directed the jury to answer the second question in the negative. Both assignments of error are well taken. Plaintiff's testimony, if true, established an exclusive agency for the sale of the land till January 1, 1915. The court, if we understand him correctly, seems to have been of the opinion that, because defendant made no separate assent to the proposition that plaintiff was to have an exclusive agency, therefore he did not assent at all. This we deem an erroneous construction of the testimony. When plaintiff said they ought to have something in writing to show what the contract was, and defendant replied, "It isn't necessary to have this in writing with me. My word is as good as my bond," he assented as well to the exclusive agency part of the contract testified to as to any other part thereof, assuming plaintiff's testimony to be true. The denial by the defendant and his sons that an exclusive contract of sale was given plaintiff made the disputed fact a jury question.

By the Court.—Judgment reversed, and cause remanded for further proceedings according to law.

WILL OF EVENSON: RUST and others, Appellants, vs. EVENSON, Administrator, Respondent.

November 19—December 7, 1915.

Trusts and trustees: Validity of trusts in personal property: Public charitable trusts: Definiteness: Wills.

1. Where a trust is in personal property only, the statute of uses and trusts (sec. 2081, Stats.) does not apply.
2. A trust in personal property is valid if it is for a lawful purpose and is sufficiently definite and certain so that a court can deal with and enforce it in the exercise of its judicial functions.
3. Public trusts created by will, charitable in their nature and for the benefit of certain classes, whether in real or personal prop-

erty, are necessarily somewhat indefinite and vague and the individuals can never be named; but if the class and the general limits of the testator's purpose be ascertainable by any reasonable means, his wishes will be carried out by the courts.

4. Bequests to an incorporated church synod to be used and applied for the benefit of certain incorporated and unincorporated charitable and educational organizations within or under the control of the synod, and bequests to separately incorporated educational institutions conducted in the interest and under the auspices of the synod, are *held* to be valid public trusts.

5. A provision in the will authorizing the synod to declare forfeited the last-mentioned bequests in case the said institutions ceased to be conducted in the interest and under the auspices of the synod, was valid.

APPEAL from a judgment of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

This is a proceeding for the construction of the will of Ouden Evenson. It was commenced in the county court and the judgment rendered in that court was affirmed upon appeal by the circuit court.

After making certain minor bequests the will in question contains the following provisions which are claimed by the appellants (the residuary legatees) to be invalid:

"VIII. I give, devise and bequeath to 'The Synod for the Norwegian Evangelical Lutheran Church in America' the hereinafter named sums of money, which shall constitute so many legacies as the institutions belonging to and owned and conducted by said Synod hereinafter named and described, and indicated in order by the letters a, b, c, d, e, and f under this eighth provision of my will. Said legacies shall bear my name and the name of my deceased wife, Randine Evenson, and be used and applied for the purposes and in the manner hereinafter stated, to wit:

"A. Three thousand dollars ($3,000) to the Church Extension Fund of said Synod, said sum of money to be lent to congregations for a term of six years provided so long a time is asked for, and for each and every loan the best security must be demanded and obtained.

"B. One thousand dollars ($1,000) to the Home for the Old People erected and conducted by said Synod near Stough-

ton, Dane Co., Wisconsin. The interest of said money to be used for the support of said Home.

"C. One thousand dollars ($1,000) to the Martin Luther Orphans' Home, owned and supported by said Synod, and situate near Stoughton, Dane Co., Wisconsin. The interest of said money to be used for the support of said Home.

"D. One thousand dollars ($1,000) to the Mission for Seamen in such parts as said Synod shall select. The interest of such money to be used for the support of said Mission.

"E. Two thousand dollars ($2,000) to the Norwegian Luther College of Decorah, Iowa, owned and supported by said Synod, and incorporated under the laws of the state of Iowa, the members of said corporation being the same as the members of said Synod. The interest of said money shall annually be used for the aid and support of one or more worthy farmers' sons studying at said college, providing they shall be in need of such aid and support. Preference in awarding the annual interest of said money shall be shown farmers' sons from the eastern district of said Synod.

"F. Two thousand dollars ($2,000) to the Luther Seminary in Hamline, St. Paul, Minnesota, owned and supported by said Synod. The interest of said money shall annually be used for the aid and support of one or more worthy farmers' sons studying at said seminary, provided they shall be in need of such aid and support. Preference in awarding the annual interest of said money shall be shown farmers' sons from the eastern district of said Synod.

"IX. I give, devise and bequeath to the hereinafter named institutions having separate incorporations, but created and conducted in the interest of and under the auspices of the Synod for the Norwegian Evangelical Lutheran Church in America, the following sums of money, to wit:

"To Gale College situate in Galesville, county of Trempealeau, and state of Wisconsin, two thousand dollars ($2,000), the annual interest of which money shall be used for the aid and support of one or more worthy farmers' sons, who shall be in need of such aid and support, and who shall be members of congregations belonging to the eastern district of aforesaid Synod.

"To H. A. Preus Academy situate in Albion, county of Dane, and state of Wisconsin, two thousand dollars ($2,000),

the annual interest of which money shall be used and applied for the same purpose and in the same manner as mentioned above under Gale College. These two above mentioned bequests shall constitute so many legacies bearing my name and the name of my deceased wife, Randine Evenson.

"In case, however, said institutions, Gale College and H. A. Preus Academy, or any or either of them, shall cease to be run and conducted in the interest and under the auspices of said Synod, and shall cease to remain under the control of and be operated by members of congregations belonging to and connected with said Synod, said Synod shall be empowered and it is hereby empowered to declare, adjudge and decree the above named legacies, mentioned in this ninth provision of my will, forfeit. And when any or both of the said legacies shall be declared forfeit, such legacy or legacies, as the case may be, shall, and it is so hereby ordered, constitute one legacy bearing my name and the name of my said deceased wife, and the annual interest of said legacy shall be used for the benefit and support of the Inner Mission of the eastern district of said Synod.

. . . . . .

"XI. All the rest or remainder, if any, of my estate which shall be left after the foregoing provisions shall be executed and provided for I give, devise and bequeath to the Synod for the Norwegian Evangelical Lutheran Church in America to constitute a legacy bearing my name and the name of my deceased wife, Randine Evenson, the annual interest of said legacy to be equally divided between the Gonner Mission of the eastern district of said Synod and the Outer Mission of said Synod and used for the support of said Mission. But if said rest or remainder shall be more than four thousand dollars ($4,000), such excess or overplus shall be equally divided between my two brothers, Ole and Gulbrand, or their heirs, and John Torgerson and Elsie Hulberg or their heirs."

It appears by the evidence that the Synod of the Norwegian Evangelical Lutheran Church in America is a corporation; that the bodies named in subdivisions A, B, C, and D of paragraph VIII are unincorporated organizations within the Synod, created by and under its direction, the work of each being charitable work along the lines suggested by

its name; that the educational institution named in subdivision E is an incorporated institution and the one named in subdivision F is unincorporated, but both are under the control of the Synod, which directs their policies and makes contributions to their support; that the institutions referred to in paragraph IX are incorporated and that their legal names are "Gale University" and "H. A. Preus Lutheran Academy" respectively, but that they are frequently called by the names used in the will; that the Synod has no absolute control over them, but makes yearly contributions to each so long as it conforms to the policy of the Synod, and also that it exercises visitorial jurisdiction over them.

It was held by both county and circuit courts that the bequests attacked were valid.

For the appellants there was a brief signed by *Bentley, Kelley & Hill,* and oral argument by *Frank R. Bentley.*

John F. Doherty (attorney for the administrator) and *James Thompson* (attorney for the Synod), for the respondent.

WINSLOW, C. J. The trusts created by this will are trusts in personal property alone, not in real estate, hence the statute of uses and trusts (sec. 2081, Stats.) has no application to them. *McWilliams v. Gough,* 116 Wis. 576, 93 N. W. 550, and cases cited. No reason is perceived why most if not all of the trusts contained in the will would not be valid as charitable trusts even if they were trusts in real estate under the doctrines so fully set forth in the cases of *Dodge v. Williams,* 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103; *Harrington v. Pier,* 105 Wis. 485, 82 N. W. 345; *Becker v. Chester,* 115 Wis. 90, 91 N. W. 87, 650; *Kavanaugh v. Watt,* 143 Wis. 90, 126 N. W. 672; *Richtman v. Watson,* 150 Wis. 385, 136 N. W. 797. As they are personal property trusts, however, it is unnecessary to decide the question.

All that is required of a valid trust in personal property

is that it shall be for a lawful purpose and be sufficiently definite and certain so that a court can deal with it in the exercise of its judicial functions and enforce it. The trusts before us are plainly not private trusts but public trusts charitable in their nature and for the benefit of certain classes; such trusts, whether in real or personal property, are necessarily somewhat indefinite and vague. The individuals can never be named, but if the class and the general limits of the testator's purpose be ascertainable by any reasonable means the wishes of the testator will be carried out by the courts. Were the trusts private trusts different considerations would arise.

We see no reason to doubt the validity of the provision in paragraph IX authorizing the Synod to declare forfeited the bequests to Gale College and the Preus Academy in case those institutions cease to be conducted in the interest and under the auspices of the Synod.

By the Court.—Judgment affirmed.

OHIO ELECTRIC COMPANY, Respondent, vs. WISCONSIN-MINNESOTA LIGHT & POWER COMPANY, Appellant.

November 19—December 7, 1915.

Contracts: Parol evidence to vary writing: Sale under trade-name: Implied warranty of fitness: Acceptance.

1. In the absence of fraud and mistake parol evidence of antecedent or contemporaneous oral agreements between the parties is inadmissible to contradict, alter, or modify their written contract.
2. Where, by written order and acceptance, vacuum cleaners were purchased merely by their known trade-name, without other specification, there was, under sec. 1684*t*—15, Stats. 1913, no implied warranty of fitness.
3. A purchaser of vacuum cleaners who retained them for two months before intimating that they were not satisfactory, and thereafter allowed two weeks to elapse before returning them, must, under sec. 1684*t*—48, Stats. 1913, be deemed to have accepted them.

APPEAL from a judgment of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

This is an action to recover the purchase price of two vacuum cleaners which the plaintiff alleges it sold and delivered to defendant under a written contract.

The plaintiff is a corporation organized and existing under the laws of the state of Illinois and is engaged in manufacturing electric vacuum cleaners. The defendant is a corporation organized and existing under the laws of the state of Wisconsin and is the assignee of all the property of the La Crosse Gas & Electric Company and assumed the liabilities and obligations of the La Crosse Gas & Electric Company. The president of the plaintiff company exhibited to Mr. Evans, the commercial manager of the La Crosse Gas & Electric Company, now the *Wisconsin-Minnesota Light & Power Company,* one of plaintiff's model H vacuum cleaners, and after a demonstration of its work Evans directed that an order for two of those machines be sent to plaintiff. The following is a copy of the material part of the order:

La Crosse Gas & Electric Co.
La Crosse, Wis., April 20, 1914.

Ohio Electric Co.,
210 N. La Salle St., Chicago, Ill.
Please enter our order for the following.....

Quantity.	Description	Price
2	Model H Vacuum Cleaners	@ $24

Please acknowledge receipt of this order by number and state when you will ship.

Authorized.

LA CROSSE GAS & ELECTRIC CO.,
By J. M. Lavaque.
Charge account No. 883.

Upon receipt of this order the plaintiff wrote to defendant acknowledging receipt of the order and advising defendant that shipment would be made on April 25th. Defendant received the machines about the 1st day of May. By a letter dated July 1, 1914, defendant notified the plaintiff that the cleaners did not work satisfactorily and that one of them

did not work at all and on July 13th reshipped them to plaintiff. Plaintiff refused to accept the machines and advised the defendant that it held them at defendant's risk.

The defendant in answer to plaintiff's complaint for the purchase price alleges that it was orally agreed before the order was given that it (defendant) should have the right of giving the cleaners a trial to ascertain if they were fit for the work intended. During the trial defendant offered evidence to show such a parol agreement and that the machines did not comply therewith because defective in workmanship. The defendant claims that under the contract of sale there is an implied warranty that the cleaners would be free from defects and offered evidence to show that one of the cleaners was so defective that it would not operate.

The circuit court refused to admit evidence of a verbal warranty or of defects in the cleaners and granted judgment in favor of the plaintiff in the sum of $87.37. From such judgment this appeal is taken.

For the appellant there was a brief by *Lees & Bunge,* and oral argument by *George W. Bunge.*

For the respondent there was a brief by *McConnell & Schweizer,* and oral argument by *C. H. Schweizer.*

SIEBECKER, J. The written order of the Gas Company for the vacuum cleaners and the plaintiff's written acceptance thereof constitute the contract of purchase. The rule is that in the absence of fraud and mistake parol evidence of antecedent or contemporaneous verbal agreements of the parties to a written contract is inadmissible to contradict, alter, or modify the written contract. *Wiener v. Whipple,* 53 Wis. 298, 10 N. W. 433; *Jackowski v. Ill. S. Co.* 103 Wis. 448, 79 N. W. 757; *Ady v. Barnett,* 142 Wis. 18, 124 N. W. 1061.

An inspection of the written order discloses that the vacuum cleaners ordered and purchased are therein specified by their known trade-name under which plaintiff offered them

in the market. These facts preclude the claim that the contract of purchase implies a warranty of fitness. Sec. 1684*t*—15, Stats. 1913; *La Crosse P. Co. v. Helgeson,* 127 Wis. 622, 106 N. W. 1094; *La Crosse P. Co. v. Brooks,* 142 Wis. 640, 126 N. W. 3.

It is contended that the defendant was prejudiced by the refusal of the court to permit it to show that one of the vacuum cleaners was so defective that it could not be operated. The defendant insists upon the right of returning both of the cleaners under its attempted rescission of the sale by returning the cleaners on July 13th, after it had received them on or before the preceding 1st of May. The answer of defendant is silent on this subject. It is urged that the pleadings in the case were framed in justice's court and the greatest latitude should have been allowed in the admission of evidence to permit defendant to show defects in the cleaners. Under the case presented defendant is not in position to invoke the right of such a disposition of the case. The facts show that it retained the cleaners for a period of two months before intimating that they were not satisfactory, and allowed two weeks thereafter to elapse before returning them to plaintiff. The retention of articles purchased is as effectual an acceptance of them as if the purchaser intimates to the seller that they are accepted. *Kelsey v. J. W. Ringrose N. Co.* 152 Wis. 499, 140 N. W. 66. Under the facts and circumstances of the case showing that defendant retained the cleaners for a period of nearly two and one-half months after having received them, it must be deemed to have accepted them as satisfactory under the contract of purchase. Sec. 1684*t*—48.

By the Court.—The judgment appealed from is affirmed.

GUILLAUME, Respondent, vs. WISCONSIN-MINNESOTA LIGHT & POWER COMPANY, Appellant.

November 19—December 7, 1915.

Negligence: Injury to plants by gas: Evidence: Sufficiency: Instructions to jury: Special verdict: Form: Discretion.

1. The evidence in this case, though largely circumstantial, is *held* to support a verdict to the effect that defendant, while repairing a service pipe, negligently permitted gas to escape into plaintiff's greenhouse, thereby causing injury to her plants.
2. It is not error to refuse to give a requested instruction which is not directed to any question in the special verdict, especially where such instruction may be misleading.
3. The form of a special verdict, so long as it covers the issues, rests largely in the discretion of the trial court.

APPEAL from a judgment of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

This action was brought to recover damages for injuries to plants belonging to the plaintiff, situate in a greenhouse in connection with plaintiff's dwelling on Sixth street in the city of La Crosse. It is the claim of the plaintiff that defendant's employees were guilty of negligence in repairing defendant's gas mains which extended into the plaintiff's premises, in consequence of which gas escaped into the greenhouse and poisoned the plants.

The jury returned the following verdict:

"(1) Did the servants of the defendant company fail to exercise ordinary care in the removal of stoppage in the gas pipes of the plaintiff at the time and place in question? *A.* Yes.

"(2) If you answer question number one 'Yes,' then was such failure to exercise ordinary care the proximate cause of the injury to plaintiff's plants? *A.* Yes.

"(3) Did the plaintiff or her servants or agents fail to exercise any ordinary care which contributed to the injury to her plants? *A.* No.

"(4) If the court shall finally determine that the plaintiff is entitled to recover, at what sum do you assess her damages? *A.* $500."

Motions for directed verdict, to change the answers in the verdict, and for new trial were denied, and judgment was rendered upon the verdict in favor of the plaintiff, from which this appeal was taken.

For the appellant there was a brief by *Lees & Bunge,* and oral argument by *George W. Bunge.*

J. E. Higbee, for the respondent.

KERWIN, J. The greenhouse in question faced westerly on Sixth street and immediately in the rear of it was plaintiff's dwelling. There was a door in the greenhouse leading from Sixth street and also a door from the greenhouse to the dwelling house. The floor of the greenhouse was on a level with the street, but there was a basement or cellar under the whole length of the dwelling divided by brick partition walls. The west basement was next to the greenhouse and contained a coal furnace which heated the greenhouse. There was an opening about three feet square in each partition wall dividing the basement. There was a stairway leading from the greenhouse down through an open doorway into the basement under the west end of the dwelling. East of this basement, but separated by walls, were two small cellars, each of which was entered from the kitchen at the east end of the dwelling. There were openings in these several cellar-wall partitions.

The defendant supplied gas for a gas stove in the kitchen of plaintiff's dwelling by a service main extending from the trunk in Sixth street under the greenhouse into the west basement of the dwelling. The gas meter was on the west wall near the stairway leading into the greenhouse.

On March 1, 1914, plaintiff notified defendant that the gas stove was not working, and defendant's manager sent men to remedy the service. The men arrived about 10 o'clock, and

the evidence tends to show that they remained about three quarters of an hour, the plaintiff being at church during this time; that there was no gas odor in the greenhouse at the time they arrived, and that after they left and when plaintiff returned from church there was a very strong smell of gas in the greenhouse so that she was obliged to open the doors and ventilators. Some smell continued two days after the repairs had been made, in consequence of which escape of gas the plants were injured.

The testimony further tends to show that the employees of the defendant at the time in question worked in the kitchen, in the small cellar beneath the kitchen, and in the west basement, which opened directly into the greenhouse; that in making the repairs defendant's employees took out a length of pipe between the kitchen stove and elbow in the east cellar under the kitchen floor, found a small piece of ice in the pipe, which they removed, replaced the length of pipe, and turned on the gas; that plaintiff's daughter also found a quantity of "black, sticky stuff" under one of the benches in the greenhouse, which smelled of illuminating gas; that after it was removed the smell ceased. There is evidence strongly tending to show and from which it may fairly be inferred that through the negligence of defendant's employees gas was suffered to escape and accumulate in the greenhouse and produced the injury to the plants complained of.

By consent of both parties the jury viewed the premises.

1. The first error assigned is that there is no sufficient evidence to support the verdict, therefore a verdict should have been directed. It is contended by appellant that the basis of the plaintiff's claim to recover is (1) on account of gas which the defendant allowed to escape in the basement; and (2) fumes escaping from refuse taken from the gas pipes and deposited in the greenhouse, referred to in the evidence as "black, sticky stuff;" and it is claimed by appellant that the testimony on the part of the defendant is to the effect that defendant's employees did the work properly and allowed no

gas to escape, and that the testimony on the part of the plaintiff is circumstantial. There is evidence, however, on the part of the plaintiff which fairly and directly leads to the conclusion that the gas was allowed to escape into the greenhouse and caused the injury by the acts of the employees of the defendant in making the repairs, and while much of this evidence is circumstantial it was sufficient to support the verdict. A fact in a civil case may be established by circumstantial evidence when the circumstances are such as to lead fairly and reasonably to the conclusion sought to be established. *Sanborn v. Walters,* 145 Wis. 84, 129 N. W. 644; *Meyer v. Hope,* 101 Wis. 123, 129, 77 N. W. 720; *Gates v. Hughes,* 44 Wis. 332, 336. Where there is credible evidence from which a reasonable inference can be drawn in support of the claim of either party the question is for the jury. *Kersten v. Weichman,* 135 Wis. 1, 114 N. W. 499; *Beyer v. St. Paul F. & M. Ins. Co.* 112 Wis. 138, 88 N. W. 57; *Hewitt v. Southern Wis. R. Co.* 159 Wis. 309, 150 N. W. 502.

We are convinced that there is ample evidence to support the verdict. A discussion of it would serve no useful purpose.

2. Error is assigned because the court refused to charge as requested: "You are instructed there is no evidence to warrant you in finding that the plaintiff's plants were injured by any substance placed by the defendant or defendant's servants in plaintiff's greenhouse." There was no error in refusing to give this instruction. In the first place it was not directed to any question of the special verdict, and moreover the instruction was misleading. The jury might well have understood that the "substance" referred to in the request meant gas escaping from the gas main, and that there was no evidence sufficient to support a finding that the plants were injured by gas.

3. Error is assigned because the court refused to submit to the jury as part of the special verdict the following: "Were plaintiff's plants injured by gas manufactured by the defend-

ant?" The questions submitted to the jury fully covered the issuable facts put in issue by the pleadings. The form of verdict, so long as it covers the issues, rests largely in the discretion of the court. *Ward v. C., M. & St. P. R. Co.* 102 Wis. 215, 221, 78 N. W. 442; *Zimmer v. Fox River Valley E. R. Co.* 118 Wis. 614, 618, 95 N. W. 957.

The court submitted, first, whether the defendant failed to exercise ordinary care in the removal of stoppage in the gas pipes at the time and place in question; second, if the first question was answered in the affirmative, then was such failure to exercise ordinary care the proximate cause of the injury to plaintiff's plants. These questions disposed of the issues of defendant's negligence and proximate cause. There was no error in refusing to submit the question. *Berndt v. Cudahy,* 141 Wis. 457, 124 N. W. 511; *Anderson v. Sparks,* 142 Wis. 398, 125 N. W. 925.

We find no error in the record.

By the Court.—The judgment is affirmed.

HETTINGER, Respondent, vs. WELLS, Appellant.

November 20—December 7, 1915.

Execution: Exemptions: Stock in trade.

1. The exemption under sub. (8), sec. 2982, Stats., of $200 in value of the stock in trade of any merchant, does not extend to cases where the stock is not actually used or kept for the purpose of carrying on the business in which he has been engaged.
2. The stock in trade of a retail liquor dealer who had failed to renew his license because of an increased license fee, and who had endeavored to sell such stock in bulk and in fact had sold some of it, was not used or kept for the purpose of carrying on the business of saloon-keeping, even though he intended to resume that business as soon as he was able to find some other suitable location.

APPEAL from a judgment of the circuit court for Monroe county: E. C. HIGBEE, Circuit Judge. *Reversed.*

The defendant was a constable and this action was brought against him to recover the value of certain goods seized by him on execution, on the ground that the goods levied upon and sold were exempt property.

The plaintiff was a retail liquor dealer in the city of Tomah prior to July 1, 1914. He did not renew his license at that time because the license fee had been raised to $800, which he felt was more than he could afford to pay. When his license expired he had on hand in stock of the trade goods and fixtures of the value of $75. Plaintiff contemplated and it was his intention to resume the saloon business as soon as he was able to find some other suitable location. After July 1, 1914, and up to the time of the seizure the plaintiff kept the goods in question at his former place of business and did not offer them for sale as a saloon-keeper. From July 1, 1914, to the date of the seizure of the goods plaintiff made repeated efforts to sell them in bulk to various people and had disposed of a portion thereof prior to said seizure. The foregoing is an epitome of the facts found by the court, about which there is no substantial dispute. As a conclusion of law the court found that the goods were exempt property not liable to seizure and sale on execution and that plaintiff was entitled to recover the value thereof. From a judgment entered in plaintiff's favor defendant appeals.

For the appellant there was a brief by *Naylor & McCaul,* and oral argument by *W. R. McCaul.*

For the respondent there was a brief by *Donovan & Gleiss,* and oral argument by *Timothy J. Donovan.*

BARNES, J. By sub. (8) of sec. 2982, Stats., the tools, implements, and stock in trade of any merchant, used or kept for the purpose of carrying on his trade or business, are

exempt from sale on execution to an amount not exceeding $200 in value.

This exemption does not extend to cases where the stock in trade is not actually used or kept for the purpose of carrying on the business in which the party has been engaged. *Kennedy v. Baker,* 3 Pin. 295; *Spence v. Rambusch,* 99 Wis. 676, 75 N. W. 950; *Prince v. Hake,* 75 Wis. 638, 640, 44 N. W. 825. Some authorities hold that the right to the exemption is not lost by a mere temporary suspension of the business, provided the intention exists to return to it within a reasonable time and as soon as there is an opportunity to do so. *Van Lue v. Wahrlich-Cornett Co.* 12 Cal. App. 749, 108 Pac. 717; *Harris v. Haynes,* 30 Mich. 140.

The court here finds that there was an intention to resume the business of retail liquor dealer, but also finds that after his license expired the plaintiff was offering and endeavoring to sell his stock in bulk and in fact had sold some of it. This would seem to efficiently negative the contention that these goods were used or kept for the purpose of carrying on the business of saloon-keeping. Plaintiff could not "keep his cake" and eat it at the same time. The case is ruled by *Walsch v. Call,* 32 Wis. 159. There is no substantial difference between the facts in that case and those established in the instant case. See, also, *Cable v. Hoolihan,* 98 Minn. 143, 107 N. W. 967.

By the Court.—Judgment reversed, and cause remanded with directions to dismiss the complaint.

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ACTION.

Grounds: Cause of action. See ANIMALS, 3. AUTOMOBILES. BANKRUPTCY, 2. CARRIERS. CONSPIRACY. CORPORATIONS, 3, 5, 6. DEATH. EXECUTORS, 2. FRAUD. HIGHWAYS, 9–14. LIBEL AND SLANDER. MASTER AND SERVANT, 5–13. MUNICIPAL CORPORATIONS, 2, 7, 10. NEGLIGENCE. NUISANCE. PARTNERSHIP. PAYMENT, 4–7. REFORMATION OF INSTRUMENTS. SALES. STREET RAILWAYS, 21–24. VENDOR AND PURCHASER, 8, 9. WHARVES. WILLS, 6.

Where cause of action arises. See VENUE.

By whom may be brought: Who may maintain. See MUNICIPAL CORPORATIONS, 10, 11. TAXATION, 16.

Conditions precedent. See TAXATION, 13–15.

Leave of court: When necessary. See EMINENT DOMAIN, 5.

Limitations. See WILLS, 2–5.

When statutory remedy is exclusive. See TAXATION, 13, 15.

Where a statutory remedy is provided for the enforcement of a common-law right without expressly or by necessary inference interfering with freedom to resort to the old remedy, the new one is cumulative unless the court on grounds of public policy sees fit to make its activity in that field more or less contingent upon the new remedy being exhausted. *Field v. Milwaukee*, 393

When action is against corporation. See CORPORATIONS, 7.

At law or in equity? See INJUNCTIONS, 3–5. WILLS, 5.

Consolidation of actions. See APPEAL, 2. MECHANICS' LIENS, 4, 7.

Dismissal or discontinuance. See DISMISSAL AND NONSUIT.

Removal from state to federal court. See REMOVAL OF CAUSES.

ADJOINING LANDOWNERS. See PARTY WALLS.

ADJOURNMENTS. See JUSTICES' COURTS, 9.

ADMINISTRATORS. See EXECUTORS AND ADMINISTRATORS.

ADMISSIONS. See EVIDENCE, 3–6.

ADVERSE POSSESSION. See TURNPIKES AND TOLL ROADS, 2.

ADVERTISEMENT: Unfair competition. See BANKRUPTCY.

AFFIDAVIT as to sale under chattel mortgage: Failure to file: Effect. See VENDOR AND PURCHASER, 5.

AGENCY. See CORPORATIONS, 1. PRINCIPAL AND AGENT.

ALIMONY. See DIVORCE, 3, 4.

AMENDMENT.
Of pleading. See CONTINUANCE. GARNISHMENT, 2. PLEADING, 3–5.
Of return of service. See JUSTICES' COURTS, 5.

ANIMALS.

Lease of farm animals: Right to increase. See EVIDENCE, 12.

1. Where farm animals are leased for a season without reservation the increase belongs to the lessee. *August Brandt & Co. v. Verhagen,* 3
2. Testimony of the lessor in this case is *held,* even if it had been proper, not to be sufficient to establish anything inconsistent with the legal effect of an unconditional written lease of live stock. *Ibid.*

Dogs: Injury to person: Liability of owner.

3. Sec. 1620, Stats. 1913, abrogates the necessity of alleging and proving *scienter* on the part of the owner or keeper of a dog which has injured a person or property, but does not impose an absolute liability for such injury. *Harris v. Hoyt,* 498
4. Plaintiff, wishing to visit a lady who lived upstairs in a duplex flat, entered a door from the street into a common vestibule, from which a door to the right led to the lower flat occupied by defendant, and a door to the left led to the upstairs flat. The two doors were about a foot apart. Plaintiff had never been in the flat before. She rang the bell of the upper flat and was told to come up by the occupant thereof, who pressed the electric button which released the lock of the door leading to it. Plaintiff tried the left-hand door, which she thought led to the upper flat, but as it did not readily open she concluded it was the wrong door, and tried the right-hand door, which opened and a dog came out and bit her while she still had her hand on the door knob. *Held,* that plaintiff was not a trespasser at the time she was injured. *Ibid.*
5. A jury in the Milwaukee civil court having found that defendant was negligent in the keeping of the dog, having in mind the prevention of injuries to any person, and the civil court having set aside the verdict and dismissed the action, it is *held* that under the evidence the circuit court was not clearly wrong in reversing such judgment and granting a new trial on the ground that whether defendant was negligent was properly a jury question. *Ibid.*

ANNUITIES. See TAXATION, 4, 17.

ANNULMENT of corporate franchise. See TURNPIKES AND TOLL ROADS, 3.

ANSWER. See COSTS, 1. DISMISSAL AND NONSUIT, 1. MASTER AND SERVANT, 2. PLEADING, 2.

APPEAL AND ERROR.

Right of appeal: Limitations.

1. The right of appeal is wholly statutory and must be exercised upon such terms and within such limitations as the written law prescribes. *Filer & S. Co. v. Chicago, M. & St. P. R. Co.* 591

Extension of time for taking. See EMINENT DOMAIN, 3, 4.

From what may be taken: Decisions reviewable. See PUBLIC UTILITIES, 1.

2. An order consolidating actions is not appealable. *Winninghoff v. Wittig*, 64 Wis. 180, overruled. *Wagner v. Racine County*, 364

3. Under sec. 3069, Stats. 1913, as amended by sec. 9, ch. 219, Laws 1915, an order of the circuit court simply reversing an order of the civil court is not appealable. *Winternitz v. Schmidt*, 421

Regularity and sufficiency of appeal: Waiver of defects.

4. Where there is jurisdiction in the trial court, sec. 2836*a*, Stats. 1915 (ch. 219, Laws 1915), is limited to curing defects in an appeal only in a matter, action, or proceeding in which an appeal is authorized by statute. *Menasha v. Wis. T., L., H. & P. Co.* 605

Exceptions: Questions presented for review: Taxation of costs.

5. If dissatisfied with the clerk's taxation of costs, a party should appeal therefrom, and then upon exceptions to the order of the trial court retaxing the costs the supreme court can review it. *Sterling E. & C. Co. v. Berg*, 280

Review: Discretionary order. See EMINENT DOMAIN, 4.

Same: Questions of fact: Verdict and findings. See AUTOMOBILES. GIFTS, 6. STREET RAILWAYS, 16–20. WORKMEN'S COMPENSATION, 16–21.

6. This court will not reverse a judgment merely because in its opinion the verdict was against the preponderance of the evidence, where the trial court refused to set aside the verdict on that ground. *Schroeder v. Watertown*, 13

7. A verdict approved by the trial court should not ordinarily be disturbed on appeal except in a clear case of error; but findings in such a verdict evidencing bias if not actual perverseness on the part of the jury may properly be considered as bearing upon the value of other findings therein. *Parkes v. Lindenmann*, 101

8. Thus, where the plaintiff, after she had seen a moving automobile only a few feet away, stepped in front of it and was struck and injured, the bias or perverseness evidenced by a finding that a person of ordinary care would not have anticipated that a collision would probably result from moving in front of the automobile under such circumstances, has a bearing on the value of a further finding that the driver of the automobile should have anticipated that plaintiff would probably move in front of it. *Ibid.*

9. A verdict, if supported by evidence, is not impeached by producing evidence which, if believed by the jury, would have supported a contrary finding. *Banaszek v. F. Mayer B. & S. Co.* 404

10. A finding by the trial court which, though nominally a finding of fact, is in the nature of a legal conclusion from undisputed evidence has not the same conclusiveness on appeal as a finding resting upon probative disputed facts, but may be disregarded almost as readily as a pure error of law. *Weigell v. Gregg*, 413

Same: Presumptions.

11. Where there is competent evidence sufficient to support a finding by the trial court this court will presume, in the absence of an affirmative showing to the contrary, that such finding rests upon the competent evidence solely. *Hilton v. Rahr*, 619

Same: Printed case not containing evidence.

12. The supreme court may refuse to consider appellant's contentions based upon the evidence where, in violation of Rule 6, the printed case contains neither the evidence nor an abridgment thereof. *Lindquist v. Bradley,* 175

Affirmance and reversal: Material and immaterial errors. See EVIDENCE, 6. HIGHWAYS, 2, 7, 12. INSTRUCTIONS TO JURY. PLEADING, 3, 5. STREET RAILWAYS, 13. TRIAL, 4–10. WORKMEN'S COMPENSATION, 21.

13. Refusal to strike out testimony, which was not responsive to any question asked, was error. *August Brandt & Co. v. Verhagen.* 3

14. In an action for the injury to plaintiff's horse and carriage caused by collision with an automobile, the jury having acquitted plaintiff's driver (his minor son) of negligence, any error in admitting evidence that he was careless became immaterial; nor could plaintiff have been prejudiced by the refusal to give requested instructions as to the law relating to negligence of children. *Koenig v. Sproesser,* 8

15. The admission of evidence on defendants' behalf as to how the defendant who was driving the automobile when the collision occurred had driven it at various times before the accident, was not prejudicial error, although such evidence was perhaps not competent. *Ibid.*

16. Where a cause is tried by the court without a jury, the admission of incompetent evidence is not available as error on appeal unless some proposition essential to sustain the judgment has no evidence to support it other than such incompetent evidence. *Hannah v. Knuth,* 467

Same: Law of the case: Decision on former appeal. See TRIAL, 6.

Determination and disposition of cause: Mandate: New trial, when ordered: Dismissal for delay.

17. If the mandate of the supreme court, applying it to the case in which it is made, necessitates a new trial or further proceedings in the court below, then such is the order of the supreme court within the meaning of sec. 3072, Stats. 1913, irrespective of the form of the mandate. Thus, upon appeal from an order granting a new trial, the mandate "order affirmed" orders a new trial within the meaning of said section. *Parkes v. Lindenmann.* 101

18. A party desiring to have an action dismissed because not brought to trial within a year as required by sec. 3072, Stats. 1913, must act seasonably. If he unreasonably stands by and causes the other party to incur expense which might be saved if he acted with reasonable promptness, he will be deemed to have waived the provisions of the statute. *Ibid.*

Costs: Printing of briefs. See COSTS, 5.

Appeal from Milwaukee civil court. See ANIMALS, 5. APPEAL, 3. COSTS, 6.

Appeal from railroad commission. See STREET RAILWAYS, 16–20.

Appeal from industrial commission. See WORKMEN'S COMPENSATION, 16–21.

Appeal to tax commission. See TAXATION, 13, 14.

Appeal from common council. See TAXATION, 15.

APPEALABLE ORDERS. See APPEAL AND ERROR, 2, 3.

ARCHITECTS. See CONTRACTS, 7, 9. MECHANICS' LIENS, 1.

ARREST AND BAIL.

1. Where an action on a bail bond given in circuit court was commenced in the civil court of Milwaukee county, the latter court obtained jurisdiction to entertain an application under sec. 2711, Stats. 1913, to extend the time for the surrender of the defendant to the sheriff in exoneration of his bail. *Meyer v. Margolis*, 479
2. The imposition of terms is not necessary as a condition of granting such relief. *Ibid.*
3. No fraudulent disposition or appropriation by the bail of the property of the defendant was shown in this case; nor does it appear that they wrongfully conspired with the defendant to keep him beyond the reach of the process of the court, or that they failed to use due diligence to have him return to the state and render himself amenable to such process. *Ibid.*

ASSESSMENT of income. See TAXATION, 13, 14.

ASSESSMENTS: Special. See MUNICIPAL CORPORATIONS, 8–11.

ASSIGNMENT of leasehold interest. See TURNPIKES AND TOLL ROADS.

ASSUMPTION OF RISK. See MASTER AND SERVANT, 15–18.

ATTORNEYS AT LAW. See COSTS, 1. DISTRICT ATTORNEYS. DIVORCE, 2. MORTGAGES, 5. PAYMENT, 4, 7.

AUTOMOBILES.

See APPEAL, 8, 14, 15. HIGHWAYS, 2, 3.

In an action for injuries sustained by a woman who ran in front of defendant's automobile, the evidence, stated in the opinion, is *held* to establish that defendant was not guilty of any negligence, notwithstanding a verdict to the contrary. *Parkes v. Lindenmann*, 101

BAIL. See ARREST AND BAIL.

BAILMENTS. See GIFTS.

BANKRUPTCY.

Preferences. See CONTRACTS, 3.

Composition. See CONTRACTS, 2, 3.

Trustee's sale: Rights of purchasers: Advertising.

1. The purchase, at the trustee's sale, of all the stock in trade of a bankrupt except the portion allowed as exemptions, did not give to the purchaser such an exclusive right to advertise the sale of such bankrupt stock as would preclude one who bought the exempt portion from also advertising it as a part of said stock. *Stumpf & Langhoff v. Espenhain D. G. Co.* 582
2. An advertisement of such exempt portion of the bankrupt's stock, containing no statements which were untrue or calculated to mislead the public, did not constitute unfair competition in trade, and a preliminary injunction against such advertising, at the suit of the purchaser of the stock sold by the trustee, was improvidently granted. *Ibid.*

BILLS AND NOTES.

Validity: Consideration: Married women. See HUSBAND AND WIFE, 1.

Same: Duress. See PAYMENT, 4.

Interest: Maximum rate: Compounding. See INTEREST.

Same: Demand note: Recovery in equity. See VENDOR AND PURCHASER, 7.

Transfer: Holder in due course: Novation.

A corporation which received certain promissory notes from the payee, before maturity, in the regular course of business, as collateral security for an existing debt of the payee, and in consideration thereof agreed to give further time for the payment of the debt, having no notice of an oral agreement of novation by which the payee had released the maker and accepted another person as liable on the notes, was a holder in due course, and so also was a subsequent purchaser of the notes from the corporation for value and before maturity; and the right of the latter to recover on the notes was not affected by the novation. *Shaffer v. Peavey,* 149

Same: Gift. See GIFTS, 5, 6.

Payment: Duress: Recovery. See PAYMENT, 4.

Same: Tender: Waiver. See TENDER.

Actions: Recovery on mortgage after note barred. See MORTGAGES, 1, 4.

Same: Recovery in equitable action. See VENDOR AND PURCHASER, 6, 7.

BOARD OF FIRE UNDERWRITERS. See CORPORATIONS, 6. MUNICIPAL CORPORATIONS, 2.

BOARD OF REVIEW. See TAXATION, 13, 14.

BONA FIDE PURCHASER. See TAXATION, 23.

BONDS. See EXECUTORS AND ADMINISTRATORS, 2. OFFICERS. PUBLIC UTILITIES, 11–13. SCHOOLS AND SCHOOL DISTRICTS. TAXATION, 8. TRUSTS AND TRUSTEES, 6.

BOUNDARIES. See PARTY WALLS.

BRIEFS: Costs for printing. See COSTS, 5.

BROKERS.

Contract of employment: Acceptance: Mutuality: Performance: Commissions. See EVIDENCE, 6. TRIAL, 9.

1. Where a broker upon receiving a proposal to pay him a commission for procuring a purchaser for property on certain terms proceeded to do the work which it was contemplated would be done by him, such action on his part constituted an acceptance and gave mutuality to the contract. *John E. DeWolf Co. v. Harvey,* 535

2. Defendants having agreed that if plaintiff would procure a purchaser and consummate a sale of land upon specified terms they would pay a certain commission and would also pay such sum as plaintiff might incur for attorneys' fees not exceeding $2,000, and plaintiff having procured a corporation to purchase the property, but upon terms differing from those specified, evidence that defendants paid a law firm $1,500 for services in examining abstracts and drawing the papers necessary to complete the transaction does not show that defendants accepted the sale as a per-

formance of the agreement on plaintiff's part, it not appearing that the attorneys' fees which defendants therein agreed to pay were for services of that character. *Ibid.*

3. From the fact, however, that defendants accepted the offer of the purchaser procured by plaintiff, together with evidence as to a conversation between the parties prior to such acceptance, the jury might reasonably infer that defendants accepted the offer as a satisfactory substitute for the terms proposed by them and as a fulfilment of the agreement on plaintiff's part. *Ibid.*

Same: Exclusive agency.

4. The question being whether plaintiff's modified contract of agency to sell defendant's farm was for an exclusive agency, plaintiff testified that, after the parties had agreed upon certain modifications of the original contract, he said to defendant that it was understood that he (plaintiff) was to have an exclusive contract as before, and also said they ought to have something in writing to show what the contract was, to which defendant replied that it was not necessary to have it in writing and that his word was as good as his bond. *Held*, that such testimony, if true, established an exclusive agency, since it showed that defendant assented as well to the exclusive part of the contract testified to as to any other part; and it was error, therefore, to take the question from the jury on the ground that there was no evidence of an exclusive agency. *Bartlett v. Doyle*, 624

BUILDING CONTRACTS. See CONTRACTS, 5–9. PAYMENT, 3.

BURDEN OF PROOF. See CARRIERS, 3. INSTRUCTIONS TO JURY, 6. MASTER AND SERVANT, 2. PUBLIC UTILITIES, 17. WORKMEN'S COMPENSATION, 13.

CANCELLATION OF INSTRUMENTS. See PARTNERSHIP, 1. TAXATION, 22. VENDOR AND PURCHASER, 6, 7.

CARRIERS.

Regulation. See RAILROADS, 1. STREET RAILWAYS, 1–20.

Misrouting of freight: Liability.

1. If a common carrier contracts to carry freight by a specified route and sends the freight by another route it becomes liable as an insurer for any injury which may result by reason of its unauthorized act. *Rosenthal v. Chicago & N. W. R. Co.* 302

2. Where a railway company which had contracted to carry horses to Chicago by one route sent them by another, but upon their arrival at Chicago they were accepted and taken charge of by the shipper's agents, who, although they might have placed them in other barns in the vicinity, put them in the stockyards barns where they became infected with stockyards fever, the company was not responsible for the damage resulting from such infection, although it was the shipper's intention (not disclosed to the railway company) that the horses should not go through to Chicago but should be stopped in transit and kept at an intermediate station on the route agreed upon, at which station, by the terms of the contract, there was to be a "stop to feed and water." *Ibid.*

Injury to passenger.

3. To entitle a passenger to recover from a railway company for injuries caused by a suitcase falling upon him from the rack above where he was sitting, he must show by a preponderance of the

evidence that the suitcase had been in the rack for such a length of time that in the exercise of ordinary care the company's employees should have discovered and removed it. *Colburn v. Chicago & N. W. R. Co.* 277

CERTAINTY. See PLEADING, 1. TRUSTS AND TRUSTEES, 2–4.

CERTIORARI. See JUSTICES' COURTS, 5, 8, 11.

CHARITABLE CORPORATIONS. See CORPORATIONS, 6.

CHARITABLE TRUSTS. See TRUSTS AND TRUSTEES, 3–5.

CHATTEL MORTGAGES: Sale: Affidavit: Failure to file. See VENDOR AND PURCHASER, 5.

CIRCUIT COURTS. See ANIMALS, 5. APPEAL. EMINENT DOMAIN, 4. JUSTICES' COURTS, 11.

CIRCUMSTANTIAL EVIDENCE. See NEGLIGENCE, 2.

CITIES. See MUNICIPAL CORPORATIONS.

CLAIMS against city. See TAXATION, 15.

CLASSIFICATION. See TAXATION, 3.

CLERICAL ERRORS. See OFFICERS.

CLERK OF THE CIRCUIT COURT: Entries by. See JUDGMENT, 2.

CO-EMPLOYEES. See MASTER AND SERVANT, 10–13.

COGNOVIT. See JUDGMENT, 3.

COLLATERAL SECURITY. See BILLS AND NOTES.

COLLISION. See APPEAL, 14, 15. HIGHWAYS, 2–4. MASTER AND SERVANT, 5, 10, 11. STREET RAILWAYS, 23.

COLLUSION. See CONSPIRACY.

COMMERCE: Regulation. See TAXATION, 10.

COMMISSIONS. See BROKERS.

COMMON CARRIERS. See CARRIERS.

COMPENSATION.
For injuries to employees. See WORKMEN'S COMPENSATION.
For public utility taken. See PUBLIC UTILITIES, 2–17.
Of town supervisors: Traveling expenses. See TOWNS, 2.

COMPROMISE AND SETTLEMENT. See EVIDENCE, 5, 6. HUSBAND AND WIFE, 1. TAXATION, 24.

CONDEMNATION. See EMINENT DOMAIN. PUBLIC UTILITIES.

CONDITIONS PRECEDENT. See ARREST AND BAIL, 2. TAXATION, 13–15.

CONFIDENTIAL RELATIONS. See WITNESSES, 3.

CONSIDERATION. See CONTRACTS, 1. HUSBAND AND WIFE, 1.

CONSOLIDATION OF ACTIONS. See APPEAL, 2. MECHANICS' LIENS, 4, 7.

CONSPIRACY.

See FRAUD, 7.

1. To constitute conspiracy no express agreement is necessary, an understanding or tacit concurrence in mental intent to effect the common purpose being sufficient; and under certain circumstances "collusion" is synonymous with conspiracy. *South Side L. Co. v. John Eller L. Co.* 399
2. A complaint charging, among other things, collusion between all except one of the defendants to defraud the plaintiff corporation,

and that in pursuance of such collusive agreement they fraudulently and corruptly converted goods and money of the plaintiff and used plaintiff's funds in the purchase of real estate, title to which was taken in the name of certain of the defendants, and praying for an accounting of the property so converted and for general relief, is *held*, on demurrer, to state but one cause of action. *Ibid.*

3. The fact that the title to some of the property in question was placed in the defendant who was not a party to the collusive agreement, rendered her a proper party to the action. *Ibid.*

CONSTITUTIONAL LAW. See JUSTICES' COURTS, 1. NEW TRIAL, 1. PUBLIC UTILITIES, 15. RAILROADS, 1. TAXATION, 1–3, 10.

CONTINUANCE.

See JUSTICES' COURTS, 10.

Trial courts have a broad discretion in the matter of granting continuances where pleadings are amended at the trial; but a plaintiff should not be permitted to plead one cause of action and then prove a different one and amend his complaint accordingly, without proper opportunity being given to defendant to prepare for trial on the new issue. *Wood v. General Railway Signal Co.* 71

CONTRACTS.

With state or city: When franchise is a contract. See STREET RAILWAYS, 1, 2.

Requisites and validity: Mutuality: Acceptance. See BROKERS, 1. CORPORATIONS, 2.

Same: Sufficiency of writing. See FRAUDS, STATUTE OF, 1, 2.

Same: Essentials of land contract. See VENDOR AND PURCHASER, 1.

Same: Consideration.

1. A written promise, by one taking over the goods and business of a retailer who was indebted to a wholesaler, to continue the business until all obligations of said retailer were satisfied, was, where relied upon by the wholesaler, based upon sufficient consideration and was a binding obligation to pay the debt to the wholesaler. *Roundy, P. & D. Co. v. Baldwin,* 342

Same: Definiteness: Legality of composition agreement.

2. By a written contract with officers and stockholders of a corporation as parties of the second part, defendants in substance agreed, first, to "make diligent efforts to purchase all of the outstanding merchandise claims" against the corporation on a basis of fifty cents on the dollar and to furnish the money therefor, or, failing in that, second, to furnish the money for a composition, to be offered by the corporation in bankruptcy, of fifty cents on the dollar, or, if that was not satisfactory to creditors or approved by the court, third, to bid at the sale in case the property of the corporation should go to a bankruptcy sale, and that, if they succeeded in so purchasing the claims or in making such composition agreement or if they purchased the property at a bankruptcy sale, they would in either case assume the liability of said second parties as indorsers upon certain notes of the corporation. As part of the consideration the second parties were to transfer to defendants their shares in the corpora-

tion; and such shares and the contract were placed in escrow. The contract was to be performed within thirty days. *Held*, that the contract was not too vague or indefinite to be enforced in law. *Sulzer v. Moyer*, 435

3. The fact that the composition agreement contemplated in such contract would result in those creditors who held the indorsed notes being paid in full, while other creditors received but fifty cents on the dollar, does not make the contract illegal, since the payment of such notes was to be made, not out of corporate funds or property, but out of the individual funds of defendants, which were not impressed with any trust in favor of creditors of the corporation. *Ibid.*

Same: Sunday contract. See GARNISHMENT, 3.

Construction and operation. See CORPORATIONS, 1–3. FRAUDS, STATUTE OF. PARTY WALLS. PAYMENT, 1, 2. VENDOR AND PURCHASER, 2, 3.

4. The fact that a contract gives one party the option to cancel it upon a certain contingency does not make its performance optional with the other party. *Sulzer v. Moyer*, 435

5. Concrete stairs are not so customary and usual in construction work that where some are marked "concrete" on the plan of a building it will be inferred that all are to be of such material—especially where it appears that the owner was undecided whether to construct them of iron or of concrete at the time the contract was let. *Sterling E. & C. Co. v. Berg*, 280

6. A finding that, as to the interior finish of a building, driving the nails in with a nail-set and concealing them with putty and paint was in accordance with a contract requiring "all nailing to be blind nailed," is *held* not to be contrary either to the evidence or to the established use of the term "blind nailing" as applied to such work. *Ibid.*

7. After an architect had prepared plans and specifications for a three-story building pursuant to a written contract by which, for such work and for superintending the construction, he was to receive one per cent. of the cost of the building, the owner changed his mind and at his request the architect prepared plans and specifications for a fourth story and also superintended the construction of a part thereof. *Held*, that in the absence of any agreement as to compensation for such extra work the architect was entitled to receive the reasonable value thereof. *Ibid.*

8. Although a building contract provides that extras shall be ordered in writing, recovery may be had against the owner for extras put in at his oral request or with his knowledge and consent. *Ibid.*

Express or implied contract. See GARNISHMENT, 2, 3.

Parol evidence to vary writing. See EVIDENCE, 11–13.

Modification. See VENDOR AND PURCHASER, 4.

Abrogation by state. See STREET RAILWAYS, 1, 2.

Waiver of conditions.

9. Although the architect cannot without express authority waive important conditions in a building contract, the parties themselves may do so. *Sterling E. & C. Co. v. Berg*, 280

Performance or breach. See BROKERS. PLEADING, 2. SALES, 1. VENDOR AND PURCHASER, 8, 9.

CONTRIBUTORY NEGLIGENCE. See HIGHWAYS, 4–6. MASTER AND SERVANT, 7, 8, 11, 14–19. RAILROADS, 2–5. STREET RAILWAYS, 23. TRIAL, 10. WHARVES, 2.

CONVEYANCES. See DEEDS. EVIDENCE, 13. PARTNERSHIP. REFORMATION OF INSTRUMENTS. SUBROGATION. VENDOR AND PURCHASER, 2–4.

CORPORATIONS.

Citizenship and residence. See REMOVAL OF CAUSES, 2.

Stockholders: Subscription to operate mines: Agency: Liability for debts incurred.

1. Where stockholders, including the president and directors, in a mining corporation signed an agreement whereby they severally subscribed certain sums "to a fund to be used in buying such articles as are necessary to operate the mill" of said company, "and to pay such bills as are pressing by having them assigned to our representative, the balance to be used to operate the mines and mill . . . , providing the directors pledge to us the gross output of the operations or enough of the product to repay us the money subscribed and guarantee to us that none of the money received by the operation of the mill shall be used for any other purpose than running said mill until we have been repaid," etc., each subscriber, whether he signed before or after the acceptance of the proposition by the directors of the company, conferred upon his associates, by clear implication, the power to create the agency necessary to carry out the purposes of the agreement, and was bound by their action even though he himself neglected or refused to take part in the selection of such agents. *Hannah v. Knuth,* 467
2. Where such proposition was presented by one or more of the subscribers at a meeting of the directors and was accepted by them, all subscribers were bound by such acceptance. *Ibid.*
3. The representatives of the subscribers, acting with the directors, having operated the mines and mill pursuant to the agreement and having incurred certain debts for work and material in the attempt, through such operation, to repay to the subscribers the amounts advanced by them, all of the subscribers became jointly liable for the debts so incurred. *Ibid.*
4. The testimony of the manager employed to take charge of the mines and mill under the agreement was sufficient to prove the claims for work and materials, and it was not necessary to prove each such claim by the testimony of the person who did the work or furnished the material. *Ibid.*

Contracts: Place and method of payment. See PAYMENT, 2.

Corporate liability for negligence of employees.

5. A private corporation acquires no immunity from liability for the acts of its employees when such acts are performed under its direction in aid of its private interest, although the services performed might be governmental if performed by a municipal corporation and by a public officer. *Sutter v. Milwaukee Board of Fire Underwriters,* 615
6. A board of fire underwriters incorporated pursuant to sec. 1922, Stats., is not a charitable corporation nor a business corporation performing charitable duties as to which the rule of *respondeat superior* does not apply. Effort made or work done in further-

ance of private interest does not become charity because such effort or work at the same time promotes the public interest. *Ibid.*

Actions against: Pleading.

7. Where, in an action to foreclose a mortgage, a security company was made a defendant on the sole ground that it had or claimed some interest or lien subsequent to the lien of the mortgage, the complaint was not demurrable merely because it failed to allege that the security company was a corporation. The action in such a case is not against the company within the meaning of sec. 3205, Stats., but notice of the foreclosure proceedings is merely given it because of its subsequent lien or claim. *Greenya v. Reliance Security Co.* 483

8. If in such a case the security company has or claims no interest subsequent to the mortgage, it should disclaim and the suit should be dismissed as to it. *Ibid.*

Same: Where cause of action arises. See VENUE.

Taxation of income. See TAXATION, 8–11.

Same: Action to question validity. See TAXATION, 16.

Bankruptcy: Composition agreement: Preferences. See CONTRACTS, 2, 3.

Annulment of franchise. See TURNPIKES AND TOLL ROADS.

Public corporations. See MUNICIPAL CORPORATIONS.

COSTS.

See APPEAL, 5. JUSTICES' COURTS, 7. VENDOR AND PURCHASER, 7.

1. In an action to foreclose a mortgage, wherein a counterclaim on the ground of fraud in the sale of the land to the mortgagor was allowed, the denial of costs to the plaintiff, including the stipulated attorney's fee, is *held* not to have been an abuse of discretion. *Brustman v. Dunn,* 306

2. Where the trial court in effect decided that its clerk had no authority to enter an order for judgment on a special verdict, and itself signed and filed a written order for judgment thereon, the date of such written order, not that of said entry by the clerk, fixed the beginning of the sixty days within which, under sec. 2894*a*, Stats., the prevailing party might tax his costs. *Banaszek v. F. Mayer Boot & Shoe Co.* 404

3. The costs taxed in an action to foreclose mechanics' liens are *held* not so large as to warrant this court in reducing them under the rule of *Krueger v. Buel,* 153 Wis. 583. *Sterling E. & C. Co. v. Berg,* 280

4. Sec. 2919, Stats. 1913, limiting costs, does not govern a consolidated action to foreclose mechanics' liens of several contractors upon a building. *Ibid.*

5. Costs are allowed in this case for the printing of only twenty pages of an unnecessarily long brief of seventy-two pages. *First Nat. Bank v. Industrial Comm.* 526

6. The hearing of an appeal to the circuit court from the civil court of Milwaukee county is brought on by motion, and motion costs not exceeding $10 may be allowed thereon. *Winternitz v. Schmidt,* 421

COUNTERCLAIM. See COSTS, 1. DISMISSAL AND NONSUIT, 1. PLEADING, 2.

COUNTIES. See TAXATION, 21.

COUNTY COURT. See EXECUTORS AND ADMINISTRATORS, 3.

COURTS.
Powers: Extension of time for taking appeal. See EMINENT DOMAIN, 4.
State and federal courts. See REMOVAL OF CAUSES.
Supreme court. See APPEAL AND ERROR.
Circuit courts. See ANIMALS, 5. APPEAL. COSTS, 6. EMINENT DOMAIN, 4. JUSTICES' COURTS, 11.
Civil court of Milwaukee county. See ANIMALS, 5. APPEAL, 3. ARREST AND BAIL, 1. COSTS, 6.
County courts. See EXECUTORS AND ADMINISTRATORS, 3.
Municipal courts. See REFERENCE, 2.
Justices' courts. See JUSTICES' COURTS.

COVENANTS. See DEEDS. EVIDENCE, 13. MORTGAGES, 1–4. SUBROGATION. VENDOR AND PURCHASER, 2.

COVERTURE. See HUSBAND AND WIFE.

CRIMINAL LAW. See HUSBAND AND WIFE, 2, 3. TOWNS, 1, 2.

CRUELTY. See DIVORCE, 5.

CUMULATIVE REMEDIES. See ACTION. TAXATION, 13, 15.

CUSTOM AND USAGE. See HIGHWAYS, 2. PAYMENT, 2.

DAMAGES.

For pain and suffering between injury and death. See DEATH.

Compensation for land taken. See EMINENT DOMAIN.

For construction of ditch. See HIGHWAYS, 1.

Special damages from slander. See LIBEL AND SLANDER, 2.

For breach of covenant to pay note. See MORTGAGES, 3.

For death: Amount recoverable. See PLEADING, 5.

Excessive damages for death or injury.

1. For the death of a laborer thirty-two years of age who left surviving him a wife and three small children and whose income was about $1,000 per year, an award of $8,500 is *held* excessive and is reduced to $6,000. *Sadowski v. Thomas Furnace Co.* 86

2. An award of $6,500 for serious and permanent injuries to a man twenty-two years old and earning at the time $55 per month, having been sustained by the trial court, is *held* not so large that this court should disturb it. *Kelly v. Kneeland-McLurg Lumber Co.* 158

3. An award of $13,000 for a fracture of the leg of a locomotive engineer twenty-nine years old and earning $1,800 per year is *held*, though large, not to be clearly excessive, it appearing that unusually bad results flowed from the injury, which for a long time wholly incapacitated him for work and permanently precluded him from resuming work as such an engineer, and there being evidence from which a jury might well say that his earning capacity was decreased forty or fifty per cent. *Callahan v. Chicago & N. W. R. Co.* 288

New trial as to damages only. See NEW TRIAL, 1.

DEATH.

See DAMAGES, 1. EVIDENCE, 2. HIGHWAYS, 8. MASTER AND SERVANT, 2–4, 8. PLEADING, 5. RAILROADS, 3, 4, 7. WHARVES. WORKMEN'S COMPENSATION, 13–15.

Recovery for pain and suffering between injury and death.

1. If a substantial period of suffering intervenes between an actionable personal injury and death resulting therefrom, damages may be recovered for such suffering. *Klann v. Minn,* 517
2. An allegation that plaintiff's decedent died "a few minutes" after being caught by flames in a burning building sufficiently shows a substantial period of suffering between the injury and death. *Ibid.*

DEBTOR AND CREDITOR. See BILLS AND NOTES. CONTRACTS, 1, 3. CORPORATIONS, 3. EXEMPTIONS. GARNISHMENT. JUDGMENT, 3. MECHANICS' LIENS. MORTGAGES, 1–4. PAYMENT. PRINCIPAL AND AGENT. SUBROGATION. TENDER.

DECLARATIONS. See EVIDENCE, 7–10.

DEEDS.

See EVIDENCE, 13. SUBROGATION. VENDOR AND PURCHASER, 2, 3.

Covenants in a conveyance of land should not be annulled merely because the grantor did not understand their legal effect. *Van Valkenburg v. Jantz,* 336

DEFAULT. See JUDGMENT, 4.

DEFINITENESS. See PLEADING, 1. TRUSTS AND TRUSTEES, 2–4.

DEFINITIONS. See WORDS AND PHRASES.

DELAY. See APPEAL, 18. REFORMATION OF INSTRUMENTS, 3. SALES, 2.

DELIVERY. See GIFTS, 1–4.

DEMAND. See VENDOR AND PURCHASER, 6, 7.

DEMURRER. See CONSPIRACY, 2. CORPORATIONS, 7. FRAUD, 6.

DEPENDENTS on deceased workman. See WORKMEN'S COMPENSATION, 13–15.

DESCENT AND DISTRIBUTION. See HOMESTEAD.

DESCRIPTION of land. See REFORMATION OF INSTRUMENTS.

DISCLAIMER. See CORPORATIONS, 8.

DISCONTINUANCE. See DISMISSAL AND NONSUIT.

DISCRETION. See ARREST AND BAIL, 2. CONTINUANCE. COSTS, 1, 6. DISMISSAL AND NONSUIT. DIVORCE, 3, 6. EMINENT DOMAIN, 4. INJUNCTION, 1, 3, 5. JUDGMENT, 3. PLEADING, 3. REFERENCE. TRIAL, 2, 3.

DISMISSAL AND NONSUIT.

See APPEAL, 18. CORPORATIONS, 8. HIGHWAYS, 14. PAYMENT, 4.

1. The trial court may refuse to permit plaintiff to dismiss or discontinue the action, even though such dismissal or discontinuance would not interfere with defendants' right to the trial of the issue on a counterclaim. *Boutin v. Andreas,* 152
2. There is no practical difference between a voluntary dismissal and a discontinuance so far as plaintiff's right to bring another action is concerned. *Ibid.*

3. Where there is a real controversy and issue has been duly joined, plaintiff may be compelled to proceed or take a dismissal which will preclude another action for the same cause. *Ibid.*

DISTRICT ATTORNEYS.

See PAYMENT, 4, 7.

It is inadvisable, if not improper, for a district attorney to act as attorney to recover civil damages arising from a supposed criminal act. *Coon v. Metzler,* 328

DITCHES and drains on lands adjoining highways. See HIGHWAYS, 1.

DIVISION OF PROPERTY. See DIVORCE, 5.

DIVORCE.

Absolute or limited?

1. Under sec. 2358, Stats., a divorce from the bonds of matrimony may be granted upon proof warranting such judgment, even though the complaint asked only a limited divorce. *Shequin v. Shequin,* 183
2. In an action for a limited divorce, the consent of plaintiff's attorneys to a judgment of absolute divorce is binding upon plaintiff, and the prayer of the complaint may be treated as amended accordingly. *Ibid.*

Alimony: Charge upon real estate only.

3. The amount to be allowed in a divorce action as alimony and for the support of minor children rests largely in the sound discretion of the trial court. *Swanson v. Swanson,* 5
4. Alimony or other allowances in a divorce action may, under sec. 2367, Stats., be imposed as a charge upon real estate of the party liable, but personal property cannot be subjected to such a charge. *Ibid.*

Division of property: Modification of decision.

5. Upon granting to the wife a divorce on the ground of cruelty, the court has power to divide property held in the wife's name but derived from the husband; and the division made in this case is *held* not erroneous. *Shequin v. Shequin,* 183
6. A motion for modification of the decision in a divorce action and for permission to produce further evidence, made after the filing of the decision but before judgment, was addressed to the discretion of the trial court; and no abuse of such discretion appearing, the denial of the motion is sustained. *Ibid.*

DOCKS. See WHARVES.

DOGS. See ANIMALS, 3–5.

DOMICILE. See REMOVAL OF CAUSES. TAXATION, 5.

DOWER. See MECHANICS' LIENS, 6.

DRAINS on lands adjoining highway. See HIGHWAYS, 1.

DUE PROCESS OF LAW. See NEW TRIAL, 1.

DURESS. See PAYMENT, 4–7.

EASEMENTS. See INJUNCTION, 2. STREET RAILWAYS, 14, 15. WATERS, 2.

ELECTION as to nature of controversy. See TOWNS, 3.

EMINENT DOMAIN.

Taking of public utility by city. See PUBLIC UTILITIES.

Taking of land for street: Compensation: Special benefits.

1. From the fact that the market value of the remainder of a tract of land is the same as the market value of the whole tract before a strip was taken therefrom for the widening of a street, it does not necessarily follow that such market value was kept up or restored by benefits equal to the market value of the strip taken. *Zwietusch v. East Milwaukee,* 519

2. Under sec. 899, Stats. 1913, where land is taken by a village for a street or other public improvement, "the special benefit, if any, to be enjoyed" by the owner "from such improvement" is to be offset or deducted, not from "the value of the land taken," but only from "the damage otherwise sustained," if any. *Holton v. Milwaukee,* 31 Wis. 27, distinguished. *Ibid.*

Construction of ditch on land adjoining highway. See HIGHWAYS, 1.

Compensation for land taken for railroad: Appeal: Time limited: Relief against award.

3. After the expiration of the thirty days limited by secs. 1849, 1852, Stats., for appealing from the award of commissioners in a proceeding to fix the compensation to be paid for land taken for a railroad, the court cannot extend the time for taking such appeal. Neither sec. 2831 nor sec. 2832, Stats., authorizes such relief; nor has the court inherent power to grant it. *Filer & Stowell Co. v. Chicago, M. & St. P. R. Co.* 591

4. If the circuit court had power to grant such an extension of time a very strong case would be required to warrant a decision on appeal that there was an abuse of discretion in refusing to grant it. *Ibid.*

5. Whether under special circumstances a court of equity might interfere to prevent the person in whose favor the award was made from having the benefit of it, is not decided. If such power exists the relief must be sought in an independent action; and no leave of court to bring such an action is necessary. *Ibid.*

EMPLOYERS' LIABILITY. See MASTER AND SERVANT. PLEADING, 3, 4. WORKMEN'S COMPENSATION.

EQUAL PROTECTION OF THE LAWS. See TAXATION, 3.

EQUITY. See DEEDS. DIVORCE. EMINENT DOMAIN, 5. INJUNCTION. JUDGMENT, 4. LANDLORD AND TENANT, 3, 4. MECHANICS' LIENS. MORTGAGES. MUNICIPAL CORPORATIONS, 10, 11. NUISANCE. PARTNERSHIP. REFORMATION OF INSTRUMENTS. SUBROGATION. TRUSTS AND TRUSTEES. VENDOR AND PURCHASER, 5–7.

ESCROW. See CONTRACTS, 2.

ESTATES IN LAND. See FRAUDS, STATUTE OF. HOMESTEAD. LANDLORD AND TENANT, 4. MECHANICS' LIENS, 6. SUBROGATION.

ESTATES OF DECEDENTS. See EXECUTORS AND ADMINISTRATORS. TRUSTS AND TRUSTEES. WILLS.

ESTOPPEL. See FRAUD, 5. GARNISHMENT, 3. MUNICIPAL CORPORATIONS, 10, 11.

EVIDENCE.

Presumptions. See APPEAL, 11. RAILROADS, 8. REMOVAL OF CAUSES, 2. TURNPIKES AND TOLL ROADS, 1. WORKMEN'S COMPENSATION, 13.

Burden of proof. See INSTRUCTIONS TO JURY, 6. MASTER AND SERVANT, 2. PUBLIC UTILITIES, 17. TURNPIKES AND TOLL ROADS, 1. WORKMEN'S COMPENSATION, 13.

Relevancy, materiality, and competency. See APPEAL, 14–16. HIGHWAYS, 6–8, 12. MASTER AND SERVANT, 10. WITNESSES, 2. WORKMEN'S COMPENSATION, 21.

Same: Res gestæ. See EVIDENCE, 8, 10.

1. In an action to recover for services performed on behalf of stockholders who, subject to acceptance of their proposition by the directors, had subscribed to a fund to be used in working the mines of the corporation, minutes of a directors' meeting at which the proposition was accepted were competent evidence as being part of the *res gestæ*. *Hannah v. Knuth*, 467

2. Where, at about 9 o'clock of the night on which he is alleged to have suffered an injury which resulted in blood-poisoning and death, a night watchman and janitor employed in a bank appeared before another employee, sucking his thumb, and stated that he had scratched or pricked it, such statement was a part of the *res gestæ* and might be testified to by the other employee in a proceeding to recover compensation for the death. *First Nat. Bank v. Industrial Comm.* 526

Admissions.

3. In a proceeding to recover compensation for the death of an employee a report of the accident made by the employer through an authorized agent was competent *prima facie* evidence of the facts stated therein, subject to be explained or contradicted. *First Nat. Bank v. Industrial Comm.* 526

4. In an action to recover for services performed on behalf of stockholders who had subscribed to a fund to be used in working the mines of the corporation, the minutes of a meeting of the subscribers reciting that thirty-three of them were present, some of whom were identified by name, that the minutes of a directors' meeting were read to them, and that they elected an advisory board of subscribers to act with the directors and also a trustee for the subscribers, were competent evidence as being in the nature of admissions. *Hannah v. Knuth*, 467

Same: Offers of settlement.

5. Conversations showing offers made before suit in furtherance of an attempted settlement are not admissible in evidence against the party making the offers. *John E. DeWolf Co. v. Harvey*, 535

6. The admission of such a conversation in evidence in an action by a real-estate broker to recover an agreed commission was not prejudicial to defendants who, although they denied liability on express contract, admitted that they were liable on *quantum meruit*,—the offer being consistent with such admission and tending to support defendants' contention rather than that of the plaintiff. *Ibid.*

Declarations.

7. Statements made by one since deceased to a third person that she had made a gift of specific property to a person named are competent evidence in an action between such donee and the administrator of the estate of the deceased. *Pirie v. Le Saulnier*, 503

8. Self-serving declarations, whether oral or written, not part of the *res gestæ*, are incompetent. *Hilton v. Rahr*, 619

9. Declarations of a donor after a gift and in derogation of it are incompetent to disprove the gift. *Ibid.*

[10. Whether, when the alleged acts and words of gift are so ambiguous that the transaction might be either a gift or a bailment, declarations of the alleged donor contained in an abortive attempt by him to make a will or codicil are competent as verbal acts and part of the *res gestæ*, not decided.] *Ibid.*

Parol evidence affecting writings. See ANIMALS, 2. TURNPIKES AND TOLL ROADS, 2.

11. In the absence of fraud and mistake parol evidence of antecedent or contemporaneous oral agreements between the parties is inadmissible to contradict, alter, or modify their written contract. *Ohio E. Co. v. Wisconsin-Minnesota L. & P. Co.* 632

12. Where a written lease for a season of live stock on a farm contained no reservation of the increase, evidence of an oral agreement that the increase should belong to the lessor was not admissible. *August Brandt & Co. v. Verhagen,* 3

13. Parol evidence is not admissible to show that a contract to convey land by "warranty deed" called for a deed containing covenants on the part of the grantee restricting the use to be made by him of the land, with reversionary provisions. *Neff v. Rubin,* 511

Opinion evidence: Experts. See MASTER AND SERVANT, 9.

Weight and sufficiency. See ANIMALS, 2. AUTOMOBILES. BROKERS, 2–4. CORPORATIONS, 4. GIFTS, 4–6. JUDGMENT, 4. MASTER AND SERVANT, 4, 6–9, 11, 19. MECHANICS' LIENS, 5. NEGLIGENCE, 2. PUBLIC UTILITIES, 17. RAILROADS, 3–6. REFORMATION OF INSTRUMENTS, 1, 2. STREET RAILWAYS, 4, 9, 16, 17. WHARVES, 2. WORKMEN'S COMPENSATION, 14, 16–21.

EXCESSIVE DAMAGES. See DAMAGES.

EXECUTION. See EXEMPTIONS.

EXECUTORS AND ADMINISTRATORS.

See TAXATION, 18. WILLS, 2–6. WITNESSES, 2.

1. The title to personal property of a testator vests in his personal representatives upon his death. *Karel v. Pereles,* 598

2. Where the executors of a will, who were also by its terms made testamentary trustees, duly qualified as executors but failed to qualify as trustees, they could not act as trustees but continued to hold title to the estate as executors, and the sureties on their bond as executors were liable for their acts whereby the trust estate was lost. *Ibid.*

3. Such executors never having qualified as trustees, the county court could not, by an order or decree, transfer the title to the property from them as executors to them as testamentary trustees. *Ibid.*

EXEMPTIONS.

See BANKRUPTCY.

1. The exemption under sub. (8), sec. 2982, Stats., of $200 in value of the stock in trade of any merchant, does not extend to cases where the stock is not actually used or kept for the purpose of carrying on the business in which he has been engaged. *Hettinger v. Wells,* 640

2. The stock in trade of a retail liquor dealer who had failed to renew his license because of an increased license fee and who had endeavored to sell such stock in bulk and in fact had sold some of it, was not used or kept for the purpose of carrying on the business of saloon-keeping, even though he intended to resume that business as soon as he was able to find some other suitable location. *Ibid.*

EXONERATION of bail. See ARREST AND BAIL, 1.

EXPERT TESTIMONY. See MASTER AND SERVANT, 9.

EXTRAS. See CONTRACTS, 7, 8.

FALSE REPRESENTATIONS. See FRAUD. GARNISHMENT, 3. PARTNERSHIP, 1.

FEDERAL COURTS. See REMOVAL OF CAUSES.

FEDERAL STATUTES. See MASTER AND SERVANT, 2, 3. PLEADING, 4.

FEES. See COSTS, 1. JUSTICES' COURTS, 6. MORTGAGES, 5.

FELLOW-SERVANTS. See MASTER AND SERVANT, 10–13.

FILING of affidavit as to sale under chattel mortgage. See VENDOR AND PURCHASER, 5.

FINDINGS OF FACT. See APPEAL, 10, 11. GIFTS, 4, 5. MECHANICS' LIENS, 5. STREET RAILWAYS, 16–19. TRIAL, 12. WORKMEN'S COMPENSATION, 16–21.

FIRE PATROL: Negligence. See MUNICIPAL CORPORATIONS, 2.

FIRE UNDERWRITERS. See CORPORATIONS, 6. MUNICIPAL CORPORATIONS, 2.

FORECLOSURE. See MECHANICS' LIENS, 5. MORTGAGES.

FOREIGN CORPORATIONS. See REMOVAL OF CAUSES.

FORMER ADJUDICATION. See TRIAL, 6.

FRANCHISES. See STREET RAILWAYS, 1, 2. TURNPIKES AND TOLL ROADS.

FRAUD.

See ARREST AND BAIL, 3. CONSPIRACY. GARNISHMENT, 3. GIFTS, 5. JUDGMENT, 4. PARTNERSHIP, 1, 2. VENDOR AND PURCHASER, 6.

False representations: Fact or opinion?

1. A representation that there was a prospective purchaser for land who had already made a *bona fide* offer of an increased price was a representation of fact, as distinguished from a promise or an opinion. *Hull v. Doheny,* 27

2. A mere expression of opinion as to the value of property will not constitute fraud, but trick or artifice must not be resorted to in order to throw the purchaser off his guard or prevent inquiry, especially where the property is in a distant state. *Ibid.*

3. The fact that an alleged fraudulent representation was in the form of an expression of opinion is not always conclusive; and when there is doubt as to whether it is made as a mere expression of opinion or a statement of fact the question must be determined by the court or jury. *Brustman v. Dunn,* 306

4. Representations by the vendor of a farm that the pasturage was sufficient for twenty-five head of cattle, that the hay land grew hay sufficient to enable twenty-five head of cattle to be kept, and that there was a cranberry marsh on the land producing ten to

twelve bushels of cranberries each year, were, on the evidence in this case, properly *held* statements of fact. *Ibid.*

Same: Waiver: Estoppel.

5. Mere requests by the makers, refused by the payee, for an extension of time on notes, where the makers did not intend thereby to waive their claim for fraud in respect to lands for the price of which the notes were given, and where the payee did not understand there was any waiver, did not amount to a waiver or estop the makers from insisting upon their cause of action for fraud. *Brustman v. Dunn,* 306

Same: Pleading: Conspiracy.

6. A complaint alleging in substance that defendants, in accordance with a prearranged plan of action for their mutual profit, induced plaintiff to buy 320 acres of land in a distant state at $40 per acre, by false representations that it was worth more and that a third person, whose written offer was shown to plaintiff, stood ready to purchase it at once for $47.50 per acre, when as matter of fact the land was not worth to exceed $7 per acre, the letter was a fiction, and the alleged bidder did not exist,—is *held*, on demurrer, to state a good cause of action. *Hull v. Doheny,* 27
7. The action in such case is not for conspiracy, but to recover damages for a wrong committed by a number of persons who agreed to act together to that end, the conspiracy being alleged merely to connect all the defendants with the overt acts of each individual. *Ibid.*

FRAUDS, STATUTE OF.

Promise to answer for debt of another. See CONTRACTS, 1.

Contract to convey real estate: Sufficiency of writing.

1. A written contract by which defendant agreed to sell to plaintiff for a specified price a lot described therein, "free and clear of all liens and incumbrances, except as to the interest of the minor child of nineteen years, on account of whom matters will be arranged according to oral agreement with Richard Elsner until such child becomes of age; otherwise warranty deed and full abstract of title will be furnished free of charge and free of defects," was not void under the statute of frauds (sec. 2304, Stats.). The agreement was to sell the lot except the interest of the minor therein; the price named was not for the entire fee in the land, but only for so much of it as the minor did not own; and the public records might properly be resorted to to ascertain what the respective interests of the defendant and the minor were. *Chudnow v. Ketter,* 432
2. A further provision in such contract that "the rents and taxes will be adjusted at the time of the delivery of the deed," did not show that there was any agreement as to those matters resting in parol, and did not render the contract void. *Ibid.*

FRAUDULENT REPRESENTATIONS. See FRAUD.

FREEDOM OF THE PRESS. See LIBEL AND SLANDER, 7.

GARNISHMENT.

Undertaking in release: Liability of sureties.

1. An undertaking in release of garnishment under sec. 2771, Stats., is to be liberally construed in furtherance of its purpose to protect the creditor. *Gist v. Equitable Surety Co.* 79

2. The rights of the surety in such an undertaking were not prejudiced by amendment of the complaint in the original action so that it asked a recovery upon *quantum meruit* instead of upon express contract, where no change in the substance of the claim was involved; and such amendment, therefore, did not discharge the surety. *Ibid.*

3. The allegation in the original complaint in such case that the work and labor for which recovery was sought was performed under an express contract, when in fact such contract was invalid because made on Sunday, did not constitute a misrepresentation in the nature of a fraud as to the surety which should estop plaintiff from enforcing the undertaking. *Ibid.*

4. Upon recovery of judgment against the surety on such an undertaking for the amount of the judgment in the original action, interest was properly allowed upon such amount from the date of the entry of the original judgment. *Ibid.*

In justices' courts. See JUSTICES' COURTS, 3–10.

GAS. See NEGLIGENCE, 2.

GIFTS.

See EVIDENCE, 7–10. TAXATION, 18.

1. A purpose to make a gift of property can only be consummated by the donor actually parting with possession of and dominion, as owner, over the subject by an absolute delivery thereof to the donee, or some one for such donee, and an acceptance by the latter. *Pirie v. Le Saulnier,* 503

2. Delivery to the agent of a donee to control the title for him, the agent being actually in possession and control as such, is sufficient to complete a gift. *Ibid.*

3. Title to property may be vested by one person in another, as donee, and custody remain in a third person, as bailee, conditioned to turn the subject over to the donee after the death of the donor. *Ibid.*

4. The evidence in this case is *held* to have warranted a finding by the trial court that there had been a good delivery and a completed gift of property. *Ibid.*

5. Findings of the trial court to the effect that an assignment of a note and mortgage, made by an aged parent about four months before her death to a son who, after coming to maturity, had continued to aid his parents and look after the home farm, was not obtained by the son by fraud or the exercise of undue influence, and that at the time of making such assignment the mother was of sound mind and memory and was acting of her own free will, are *held* to be sustained by the evidence. *Baskfield v. Molthen,* 31

6. Oral comments by the trial judge upon the informality of a transaction by which, it was claimed, without any written transfer a father made a gift to his son of a note for a large amount executed by the son and secured by a mortgage, are *held* not to show that the judge believed the evidence insufficient in law to support a gift or that his finding against a gift was based upon an erroneous view of the law. *Hilton v. Rahr,* 619

GROSS NEGLIGENCE. See RAILROADS, 7. STREET RAILWAYS, 24.

HARMLESS ERRORS. See APPEAL, 13–16. PUBLIC UTILITIES, 15.

HEADLIGHTS. See RAILROADS, 1.

HIGHWAYS.

Construction: Drainage: Ditch on adjoining land. See TOWNS, 3.

1. Under secs. 1236, 1237, Stats., where a drain or ditch is constructed upon land adjoining a highway, damages are recoverable by the owner, but assessment or consideration of "special advantages" is provided for in sec. 1237 only in cases where material is actually taken from the land and placed on the road. *Harvie v. Caledonia,* 314

Obstruction: Dike on adjoining land to keep back surface water. See WATERS, 4.

Use of highway: Negligence: Law of the road.

2. In an action for injury caused by collision between a horse and carriage and an automobile, a charge to the jury to the effect that owners of automobiles and of horses have equal rights on the public highway; that it is the duty of the driver to give warning to one driving a vehicle in front before attempting to pass; that the sounding of an automobile horn is the usual way of giving warning; that although there was no statute on the subject at the time of the accident it was the custom for a driver coming up behind another vehicle and passing it to turn to the left, and for the driver of the vehicle ahead to turn to the right, but that such rule or custom was not inflexible and might be varied by circumstances—was, at least, not prejudicially erroneous. *Koenig v. Sproesser,* 8
3. Although the jury found that neither driver was negligent and that neither party sustained any damage, the verdict was not necessarily perverse. *Ibid.*
4. In an action for personal injuries sustained when defendant's wagon collided with plaintiff's buggy which was being driven in the opposite direction on the extreme right of the traveled track, it is *held* on the evidence that plaintiff was not guilty of contributory negligence as a matter of law in failing to have her buggy brought to a standstill before the collision occurred or in failing to shout a warning to defendant's driver. *Lloyd v. Pugh,* 158 Wis. 441, distinguished. *Muehlbauer v. Klokner,* 410
5. It is not negligence as a matter of law to permit an eleven-year-old boy, when accompanied by a parent, to drive a horse which is not shown to be difficult to manage. *Ibid.*

Injuries from defects: Evidence: Law of the road. See PLEADING, 5.

6. The law of the road as established by statutes and decisions in this state deals with the duties of travelers at street and highway intersections, or when meeting one another, or when one wishes to pass another going in the same direction, but does not affect the question of contributory negligence in a case where a person was injured by a defect in a street while driving on the left side thereof and the evidence tended to show that he had necessarily veered to the left because teams were lined up on the right side. *Schroeder v. Watertown,* 13
7. The exclusion, as evidence in such case, of a municipal ordinance relating to the rule of the road but not shown to differ from the statute and common law, cannot be held error. *Ibid.*
8. In an action for death of a person alleged to have been caused by a hole in the street on which he was driving, there being evidence of the existence of the hole at the time of the accident and

evidence tending to show that there was no material change in conditions for a long time thereafter, the testimony of a surveyor as to measurements of the hole made by him five days after the accident was competent. *Ibid.*

Same: Sidewalks: Footpath on embankment: Railing or guard.

9. Towns are not required to keep country roads in suitable condition for travel for their whole width, nor are they required to build sidewalks thereon. *Marcus v. Medford,* 155

10. A cut having been made through a hill and the traveled track of the highway being through such cut, one who, while walking at night on a footpath which went over the hill within the limits of the highway, was injured by falling down the embankment to the road below, cannot recover from the town for such injury. *Ibid.*

11. The traveled track through the cut being reasonably safe, sufficient, and suitable for travelers on foot or by vehicle, and the footpath being obviously outside of the traveled track, the town was not bound to maintain a guard or railing along the top of the embankment to protect persons using such path. *Ibid.*

12. The exclusion of evidence as to the action of the town board upon a petition for the laying of a sidewalk along said highway was not prejudicial error, it appearing that the town did not lay the sidewalk and that it did not extend to the place in question. *Ibid.*

Same: Accumulation of ice or snow: "Existed for three weeks."

13. An accumulation of snow or ice upon a highway "existed for three weeks" within the meaning of sec. 1339, Stats., if it and the danger resulting therefrom existed for that time in substantially the same form and degree, though subject to those natural changes inevitable in our climate. *Lindquist v. Bradley,* 175

14. A boom-stick left upon the highway by an individual defendant, and upon which plaintiff's head struck when she was thrown from a sleigh, having had nothing to do with the unsafe condition of the highway and no proximate relation to the accident, a nonsuit as to such defendant was proper. *Ibid.*

Same: Instructions to jury.

15. In an action for injuries alleged to have been caused by defects in a highway, a charge that the law requires towns to keep their highways in a reasonably safe condition, and that the jury were to apply their experience and judgment to the existing circumstances in each case and say whether the highway was reasonably safe, was not erroneous either as informing the jury of the effect of their answers or as allowing them to base an answer on their own knowledge and not upon the evidence. *Lindquist v. Bradley,* 175

HOLDER IN DUE COURSE. See BILLS AND NOTES.

HOMESTEAD.

1. The qualified life estate in the homestead which descends to the widow of an intestate who leaves issue cannot be changed to an absolute life estate by sale of the homestead. Her interest in the proceeds of the sale remains the same as in the land, namely, the right to the use thereof during widowhood. *Lands of Sydow,* 325

2. The probable duration of widowhood not being determinable, the present value of a widow's homestead estate cannot be ascertained and awarded to her in gross. *Ibid.*

3. The homestead in which the widow of an intestate leaving issue takes a life estate by descent is limited to the quantity and value prescribed in sec. 2983, Stats., the statutory definition of the term "homestead" being applicable, under sec. 2984*a*, as well to the descent of land as to exemptions. *Ibid.*

4. Under sec. 2270, Stats., providing generally for the descent of real property, and sec. 2271, providing that a homestead not lawfully devised shall, if the owner leave a widow and issue, descend "to his widow during her widowhood and upon her marriage or death to his heirs *according to the next preceding section*," the heirs take at the death of the owner a vested estate, subject to the conditional life estate of the widow. *Miller v. Hart*, 611

HUSBAND AND WIFE.

Liability of wife for torts: Note in settlement.

1. A married woman is responsible for a tort committed by her when not under coercion by her husband, and may give a valid note in settlement of an action brought against her therefor. *Huber v. Seeger*, 135

Dower right. See MECHANICS' LIENS, 6.

Invalid marriage: Supposed wife not a "member of the family." See WORKMEN'S COMPENSATION, 15.

Abandonment of wife: Nonsupport: "Necessitous circumstances."

2. An able-bodied man of presumably some business ability, in good health, who contributed only $12 during seventeen months to the support of his wife and child is *held* not to have contributed to the extent of his ability. *Brandel v. State*, 532

3. A wife is in necessitous circumstances, within the meaning of sec. 4587c, Stats., when she does not have property or money available for such necessities or ordinary comforts of life as her husband can reasonably furnish, even though she has the clothing, furniture, and ornaments usually owned by a woman in her station in life or receives aid from others. *Ibid.*

IMPEACHMENT. See WITNESSES, 4.

IMPROVEMENTS. See MUNICIPAL CORPORATIONS, 7–9.

INCOME TAX. See TAXATION, 1, 2, 4–16.

INDETERMINATE PERMIT. See PUBLIC UTILITIES, 13.

INDUSTRIAL COMMISSION. See WORKMEN'S COMPENSATION, 8, 9, 14, 16–21.

INFANTS. See WORKMEN'S COMPENSATION, 1.

INHERITANCE TAX. See TAXATION, 4, 17–19.

INJUNCTION.

See BANKRUPTCY, 2. LANDLORD AND TENANT, 3, 4. MUNICIPAL CORPORATIONS, 10, 11. NUISANCE, 1.

1. The power to issue mandatory injunctions is sparingly used. *Gimbel Brothers v. Milwaukee Boston Store*, 489

2. In cases involving the right to the use of easements substantial damage is necessary to support an injunction. *Ibid.*

3. Courts generally exercise their discretion against issuing an injunction where it will produce great public or private mischief merely to protect technical, doubtful, or unsubstantial rights, the plaintiff in such a case being relegated to his remedy at law to recover damages. *Ibid.*

4. A defendant will not ordinarily be compelled to pull down an expensive structure merely because some legal right may be invaded if the injury complained of is slight and if his acts were performed in good faith and in the belief that he was acting within his legal rights. *Ibid.*

5. Thus, where defendants, relying on the validity of proceedings by a city to vacate part of an alley, began the erection of a building which inclosed the vacated portion, and thereafter plaintiff, who was a lessee of abutting property, brought an action to declare void the vacation proceedings, to restrain defendants from obstructing the alley, and to compel the restoration thereof, it was within the sound discretion of the trial court to deny the relief, no substantial injury to the plaintiff being shown. *Ibid.*

INSTRUCTIONS TO JURY.

Construction of charge: Informing jury as to effect of answers: Application of jurors' own experience and judgment. See HIGHWAYS, 15.

Instructions taking place of separate question in special verdict. See TRIAL, 5, 7–9.

Requests for instructions: Refusal to give. See APPEAL, 14.

1. It is not error to refuse to give requested instructions which are sufficiently and correctly covered by the general charge. *Taylor v. Northern Coal & Dock Co.* 223

2. Same point. *Koenig v. Sproesser,* 8

3. It was not prejudicial error to refuse requested instructions to the effect that there was no evidence that defendant's employees knew the hearing of the deceased was not acute, and that if he was hard of hearing it was his duty to govern himself accordingly—it not appearing that dullness of hearing had anything to do with the accident. *Taylor v. Northern C. & D. Co.* 223

4. Where the charge was sufficiently full and complete and fairly advised the jury as to the law by which they should be governed, there was no error in refusing to give requested instructions, even though they were correct as abstract propositions of law. *John E. DeWolf Co. v. Harvey,* 535

5. It is not error to refuse to give a requested instruction which is not directed to any question in the special verdict, especially where such instruction may be misleading. *Guillaume v. Wisconsin-Minnesota L. & P. Co.* 636

Erroneous instructions: Verdict contrary thereto not necessarily perverse. See TRIAL, 1.

Same: Burden of proof: When error harmless.

6. Error in the instructions as to the burden of proof upon certain questions in the special verdict is not prejudicial where such questions were immaterial and answers thereto may be treated as surplusage. *Taylor v. Northern C. & D. Co.* 223

Brokers: Commissions. See TRIAL, 9.

Highways: Injuries from defects. See HIGHWAYS, 15. TRIAL, 5.
Law of the road. See HIGHWAYS, 2.
Negligence of children. See APPEAL, 14.
Proximate cause. See INSTRUCTIONS TO JURY, 3. TRIAL, 5.

INTEREST.

See GARNISHMENT, 4. MORTGAGES, 4. TAXATION, 8. VENDOR AND PURCHASER, 7.

Even though a note expressly provides for the compounding of interest, the maximum recovery for interest thereon must not, under sec. 1689, Stats., exceed ten per cent. per annum simple interest. *Ogden v. Bradshaw,* 49

INTERSTATE COMMERCE. See MASTER AND SERVANT, 2, 3. PLEADING, 4. TAXATION, 10.

JOINDER.
Of causes of action. See CONSPIRACY, 2. PARTNERSHIP, 3.
Of parties. See CONSPIRACY, 3. MECHANICS' LIENS, 7. PUBLIC UTILITIES, 12. TAXATION, 21–24.

JUDGMENT.

When not to be entered. See PUBLIC UTILITIES, 1.

Order for judgment: Entry by clerk. See COSTS, 2.

When announcement is judgment: Clerk's entries.

1. The announcement of judgment from the bench is the judgment in fact, and the written judgment generally is merely the evidence thereof; but it should be certain that the court intends to pronounce judgment and not merely to make a preliminary order which is expected to result later in a judgment. *Wehr v. Gimbel Brothers,* 485
2. An entry in the clerk's minutes stating that defendant's motion to dismiss the complaint was "granted as per findings to be filed," and entries at a later term showing continuances of "the matter as to a rehearing," together with unsigned and unfiled findings of fact found among the papers in the case, are *held* to show that judgment was not pronounced at the time of the first entry. *Ibid.*

Construction: Restricting scope. See MUNICIPAL CORPORATIONS, 11.

Scope of judgment in equitable action: Terminating litigation. See VENDOR AND PURCHASER, 6.

By confession: Cognovit: Reopening case: Discretion.

3. It was an abuse of discretion to refuse to reopen a case in which judgment had been entered on cognovit and permit defense to be made, where the moving papers included an answer setting forth a complete defense and showed that the judgment was suffered through "mistake, inadvertence, surprise, or excusable neglect." *Winternitz v. Schmidt,* 421

By default: Restraining enforcement: Laches.

4. In an action to restrain enforcement of a judgment by default on the ground that it was inequitable and obtained by fraud, the evidence is *held* to sustain the findings of the trial court that there was no fraud or unfair conduct in securing the judgment,

and that plaintiff, having slept upon his rights for more than two years, was not entitled to equitable relief. *Todd v. Loomis.* 233

In divorce action. See DIVORCE, 1, 2, 4.

On foreclosure of mortgage: Deficiency. See MORTGAGES, 1, 2.

Interest on judgment. See GARNISHMENT, 4.

Reversal on appeal. See APPEAL, 6–16.

Judgments of justices of the peace. See JUSTICES' COURTS, 2, 7, 8, 11.

JURISDICTION. See ARREST AND BAIL, 1. JUSTICES' COURTS, 1–7. REMOVAL OF CAUSES.

JUSTICES' COURTS.

Limiting number of justices in cities: Power of legislature.

1. Under sec. 15, art. VII, Const. (providing that the number and classification of justices of the peace to be elected in towns, cities, and villages shall be regulated by law, and that they shall have such civil and criminal jurisdiction as shall be prescribed by law), the legislature had power (by ch. 468, Laws 1911) to limit the number of justices in cities of the first class to one, leaving that one clothed with extensive civil jurisdiction and many important powers and duties, fixing a moderate salary for him, and imposing no handicap preventing the acceptance of or holding the office. *State ex rel. Burke v. Hinkel,* 144 Wis. 444, distinguished. *State ex rel. McLogan v. Burke,* 429

Jurisdiction.

2. The rule that justices of the peace must keep strictly within the limits of the jurisdiction conferred upon them does not mean that the higher courts are to be hostile to their judgments, but merely that the justices are to exercise only the jurisdiction conferred upon them by statute fairly construed. *De Laval Separator Co. v. Hofberger,* 344

Same: Garnishment: Service of summons: Amendment of return: Fees: Costs: Payment into court by garnishee.

3. Where the return of the officer on the principal summons in justice's court was that the defendant "not being found and having no residence or no known agent or attorney within the said county, I am unable to serve upon the within named defendant," and a garnishee answered admitting indebtedness to the defendant, such return and answer were sufficient to authorize service of the garnishee summons upon the principal defendant by publication, under sec. 3718, Stats. *De Laval Separator Co. v. Hofberger,* 344

4. Within the meaning of sec. 3718, Stats., a member of the defendant's family residing within the jurisdiction of the justice must be residing at defendant's residence. *Ibid.*

5. It is the fact of service of the summons upon defendant, and not merely the proof of that fact, which gives a justice jurisdiction, except in those cases where by statute jurisdiction is made to rest on the proof; and even after the issuance and service of a writ of *certiorari* an amended return showing proper service of the summons should be taken to cure any omissions in the original return. *Ibid.*

6. Where a garnishee voluntarily appears and answers, failure to pay fees to him is not a jurisdictional defect. *Ibid.*

7. Adding the costs of a garnishee action to the judgment in the principal action is error, but does not go to the jurisdiction. *Ibid.*

8. The judgment of a justice's court in the principal action is not so affected as to be open to attack on writ of *certiorari* by the fact that the garnishee failed to pay into court the sum which he was ordered to pay in. *Ibid.*

Same: Adjournment: Continuance.

9. A second adjournment of a cause in justice's court will be presumed to have been for cause, although the docket does not so state. *De Laval Separator Co. v. Hofberger,* 344

10. Holding open a garnishee action to await the termination of the principal action is equivalent to a continuance for that purpose. *Ibid.*

Review on certiorari: Quashing writ.

11. Where in the petition for a writ of *certiorari* to review a justice's judgment for a trifling sum it was not denied that defendant owes that sum, and the objections to the judgment are technical and do not relate to jurisdiction of the subject matter, the circuit court should quash the writ *sua sponte. De Laval Separator Co. v. Hofberger,* 344

JUSTIFICATION. See LIBEL AND SLANDER, 6.

LACHES. See JUDGMENT, 4. MUNICIPAL CORPORATIONS, 10. PARTNERSHIP, 2. REFORMATION OF INSTRUMENTS, 3.

LAND CONTRACTS. See EVIDENCE, 13. FRAUDS, STATUTE OF. REFORMATION OF INSTRUMENTS, 1. VENDOR AND PURCHASER.

LANDLORD AND TENANT.

Leases and agreements: Rights of lighting company.

1. The owner of a building has a legal right to lease it on such terms as he and the tenants may agree to with reference to the lighting thereof. *People's Land & Mfg. Co. v. Beyer,* 349

2. Thus, where tenants might themselves discontinue the lighting service which was being furnished to them by one company, and the lessor might terminate their leases on short notice, he had the right to require as a condition of continuing the tenancies that the current for lighting be obtained from another company. *Ibid.*

3. Although in such case the company which had been furnishing the service was entitled to a preliminary injunction restraining the cutting or disconnecting of its wires without notice, yet when it appeared that in so doing the new company was acting contrary to the instructions of the lessor and that there was no intention to proceed arbitrarily or without notice in the future, there was no sufficient ground for continuing the injunction in force against the lessor. *Ibid.*

Same: Mistake in lease. See REFORMATION OF INSTRUMENTS, 2, 3.

Lease of farm animals: Right to increase. See ANIMALS, 1, 2. EVIDENCE, 12.

Assignment of lease: Rights of assignees. See TURNPIKES AND TOLL ROADS.

Tenant holding over after term. See TURNPIKES AND TOLL ROADS, 3.

Protection of leasehold interest. See INJUNCTION, 5.

4. A lessee has a right to protect his leasehold interest against unlawful interference therewith, but in the matter of restraining the closing of an adjacent alley he does not stand in the same position before the court as would the owner, even though he has an unexpired option to purchase the leased premises. *Gimbel Brothers v. Milwaukee Boston Store,* 489

LAW OF THE CASE. See TRIAL, 6.

LAW OF THE ROAD. See HIGHWAYS, 2, 4, 6, 7.

LEASES. See ANIMALS, 1, 2. EVIDENCE, 12. LANDLORD AND TENANT. REFORMATION OF INSTRUMENTS, 3.

LEGISLATIVE POWER. See JUSTICES' COURTS, 1. NEW TRIAL, 1. RAILROADS, 1. TAXATION, 1–3, 10.

LIBEL AND SLANDER.

Slander: Words actionable per se: Special damage.

1. Words alleged to have been spoken by the pastor of a church concerning plaintiff, who had charge of the collection of the accounts of the parish, to the effect that the books showed that a certain sum had been collected but there was "no account to show what became of it," are *held* not to be actionable *per se,* because they do not in their natural and ordinary meaning charge a criminal offense but merely slovenly or imperfect bookkeeping. *Laurent v. Van Somple,* 354

2. Alleged loss of customers in his business as a blacksmith cannot be *held* to be the natural or proximate result of the charge of bad bookkeeping so made, so as to render the words actionable. *Ibid.*

Libel: Newspaper article, when actionable.

3. Language which imputes a crime is libelous *per se,* as is also language calculated to subject a person to public hatred, degradation, ridicule, or contempt. *Leuch v. Berger,* 564

4. The question whether or not an article is capable of a libelous meaning is for the court, and such meaning may be so clear that the court should say as matter of law that it is libelous; but where there is any substantial doubt as to what the meaning is, it is for the jury to say whether or not the meaning attributed to the language is the correct one. *Ibid.*

5. Where there is no ambiguity in respect to the actionable quality of the language used nor as to the person whom it concerns, no allegation by way of inducement or colloquium is necessary. *Ibid.*

6. The defendant may not attribute some recondite meaning to an alleged libelous article and proceed to justify on that basis, for the words must be construed in the plain and popular sense in which they would naturally be understood, read in the light of the entire article. *Ibid.*

7. The freedom of the press does not comprehend the publication of untruthful statements about a private person or public officer, where such statements charge crime or tend to make the individual or officer attacked an object of public hatred, ridicule, or contempt; and the publisher is bound at his peril to know whether statements of that character are true or false before they are given out to the world as true. *Ibid.*

8. A newspaper article conspicuously headed "City Clerk's Force Charged with Graft," and stating, among other things, that "graft charges" had been made against the "city clerk, and members of his office force" (when in fact no such charges had been made when the article was published), that "City Clerk Leuch and every member of his department are said to be implicated in a scheme to get part of the money appropriated by the common council for the preparation of the tax levy" (when there was no way in which the city clerk could lawfully get any part of such money), might be understood as charging such city clerk with a criminal act, as well as setting forth untrue matter which was calculated to hold him up to public hatred, contempt, and degradation; hence it could not be said as matter of law that such article was not libelous. *Ibid.*

Same: Liability of business manager and of editor.

9. In such case, the liability of the newspaper corporation being a jury question, the liability of its business manager was also for the jury, upon proof that one of his duties consisted in attending to the circulation of the paper. *Leuch v. Berger,* 564

10. It being admitted in the answer that the editor of the newspaper had immediate charge and control of it and of all matters published therein, and had active management and control of all the publications of the paper, the question of his liability was also for the jury, even though he testified he know nothing about the article until after it was published, that he was serving as a Congressman in Washington, D. C., at the time, and that he had nothing to do with the collection of facts from which it was written. *Ibid.*

LICENSEES. See RAILROADS, 2, 3. WHARVES, 1.

LICENSES: Power of city: Stationary engineers. See MUNICIPAL CORPORATIONS, 5, 6.

LIENS. See MECHANICS' LIENS.

LIFE ESTATES. See HOMESTEAD. MECHANICS' LIENS, 6. SUBROGATION.

LIMITATION OF ACTIONS. See MORTGAGES, 2. MUNICIPAL CORPORATIONS, 4. WILLS, 2–5.

LIVE STOCK. See ANIMALS, 1, 2.

LONG ACCOUNTS. See REFERENCE.

MACHINERY: Guarding. See MASTER AND SERVANT, 9.

MALFEASANCE in office. See TOWNS, 1, 2.

MANDATE: Form: New trial. See APPEAL, 17.

MANDATORY INJUNCTION. See INJUNCTION.

MARKET VALUE. See EMINENT DOMAIN, 1.

MARRIAGE AND DIVORCE. See DIVORCE. WORKMEN'S COMPENSATION, 15.

MARRIED WOMEN. See HUSBAND AND WIFE. WORKMEN'S COMPENSATION, 15.

MASTER AND SERVANT.

Services and compensation.

1. In an action to recover for services, a judgment for plaintiff in the civil court, affirmed by the circuit court, is *held* to be sustained by the evidence. *Hott v. West Allis Iron Works,* 117

Master's liability for injuries to servant. See WORKMEN'S COMPENSATION.

Same: When federal statute governs: Interstate commerce. See PLEADING, 4.

2. Where the complaint in an action for death caused by negligence predicated liability under the state statutes, but defendant affirmatively claimed that the case fell under the federal Employers' Liability Act, defendant had the burden of proof on that proposition. *Zavitovsky v. Chicago, M. & St. P. R. Co.* 461

3. Coal which was piled on a dock and had passed out of interstate commerce was loaded upon cars and thence dumped into hoppers which projected into a sunken room or basement. From the hoppers it was taken by conveyors to a bin, was weighed out from such bin, and then went into another bin, from which it was spouted into the tenders of locomotives employed in interstate commerce. Railway employees were required every night to clean up, with shovels, the scattered coal from the floor of said sunken room and throw it into the conveyor, which carried it to the bins. While so doing one of them was fatally injured. The purpose of their work was primarily to clean the floor and the fact that the coal cleaned up finally reached the interstate locomotives was merely incidental. There were one or two men or crews of men between the deceased and the locomotives, as well as between the deceased and the coal pile on the dock. *Held*, that these facts did not show that the deceased when injured was engaged in interstate commerce. *Ibid.*

4. Plaintiff's evidence in this case as to the description of the place of work, its surroundings and lighting, and also as to the manner in which deceased came to his death, is criticised as defective. *Ibid.*

Same: Unsafe working place: Warning.

5. Where an employee of a railway signal company, riding on a motor car upon the tracks of a railway company, was injured by a collision between such car and the rear end of a railway train in a tunnel, the safe-place rule prescribed by sub. (11), sec. 2394—41, and sec. 2394—48, Stats., has no application as against the signal company, which had nothing to do with the operation of the train or the patroling of the track or tunnel and omitted no duty in regard to making the place of employment less dangerous than it was. *Wood v. General Railway Signal Co.* 71

6. In an action for injuries to an employee caused by the rolling of logs which he was assisting in loading upon a car, the evidence, showing that other and safer loading devices might have been used, is *held* to sustain a finding by the jury that the employer failed to furnish plaintiff a place of employment which was as free from danger as the nature of the employment reasonably permitted. *Kelly v. Knceland-McLurg L. Co.* 158

7. The evidence in such case is *held* also to sustain a finding by the jury that plaintiff was not guilty of contributory negligence. *Ibid.*

8. In an action for death of a laborer caused by a mass of frozen iron ore rolling down from the top of a pile at the foot of which he was working, the evidence being conflicting as to whether he had been warned of the danger of working there and ordered to work in another place, the question of his contributory negligence was one for the jury. *Sadowski v. Thomas F. Co.* 86

Same: Insecurely guarded machinery.

9. Under secs. 1636*j* and 1636*jj*, Stats. 1911, which made the duty to securely guard dangerous machinery an absolute one, testimony

of an employee that when, as the result of a sudden jerk, his fingers went through a slot in the guard and came in contact with the rollers of a machine for pressing shoe soles they were caught and drawn further in, and that a thin cast-iron strip forming the base of the guard broke and gave way, allowing his hand to be severely hurt, was sufficient to justify the jury in finding that the rollers were not securely guarded, although there was expert testimony to the effect that the guard could not be broken in the manner described. *Banaszek v. F. Mayer Boot & Shoe Co.* 404

Same: Negligence of other employees: Violation of rules: Scope of authority. See PLEADING, 3.

10. In an action for injuries sustained by an employee of a railway signal company in a collision between the motor car upon which he was riding and the rear end of a railway train which the car had followed into a tunnel 900 feet long, in which the smoke was so dense that it was impossible to see objects after entering it, an allegation that another employee in charge of the motor car was negligent in running it too fast and too close to the train and in failing to check and stop it in time to avoid the collision, was broad enough to justify the admission of evidence that such other employee was negligent in not stopping the car before entering the tunnel, so as to ascertain whether or not the way was clear. *Wood v. General Railway Signal Co.* 71

11. The evidence in such case is *held* to sustain findings by the jury that the employee in charge of the car was negligent in driving it into and through the tunnel until it collided with the train, and that plaintiff, who was subject to the orders and direction of such employee, was not guilty of contributory negligence. *Ibid.*

12. Even if, in attempting to run an engine in the absence of the engineer, in violation of a rule of the company, a fireman was acting outside the scope of his authority so that the company was not liable for his negligence, the company is nevertheless liable for negligence of the engineer in directing the fireman to do as he did and in failing to operate the engine himself. *Callahan v. Chicago & N. W. R. Co.* 288

13. The fireman of an engine who, in furtherance of the railway company's business, attempts to run the engine himself by the direction but in the absence of the engineer, although he thereby violates a rule of the company is not acting without the scope of his authority so as to exempt the company from liability for his acts. *Ibid.*

Same: Contributory negligence: Assumption of risk. See MASTER AND SERVANT, 7, 8, 11.

14. Contributory negligence is established when it is shown that plaintiff failed to take such precautions for his own safety as a person of ordinary care and prudence would usually take under the same or similar circumstances. *Fandek v. Barnett & Record Co.* 55

15. The defense of assumption of risk which was abolished by sub. (1), sec. 2394—1, Stats. 1911, in actions for personal injuries to employees, relates to such risks as could be assumed within the field of ordinary care; but if an employee, either knowingly or ignorantly through a want of ordinary care, serves under a

risk when the imminence of serious injury therefrom is so great that an ordinarily careful and prudent man similarly situated would not usually serve under it, his conduct is contributory negligence, and the defense based thereon remained available to the employer under the statute of 1911, although afterwards abolished in certain cases by par. (3), sub. 1, sec. 2394—1, Stats. 1913. *Besnys v. Herman Zohrlaut L. Co.* 157 Wis. 203, explained and limited. *Ibid.*

16. The abolition of the defense of assumption of risk does not absolve the employee from the duty of exercising ordinary care for his safety; and whenever his failure to do that causes his injury in whole or in part he is guilty of contributory negligence, irrespective of whether the negligence consists in an omission to discover a danger that ought to be discovered and shunned, or in a careless or bungling manner of doing an act otherwise reasonably safe, or in voluntarily assuming a risk that an ordinarily careful and prudent man similarly situated would not usually assume. *Ibid.*

17. No sharp distinction always exists between contributory negligence and mere assumption of risk, and it is in most cases for the jury to say whether the conduct in question is one or the other. *Ibid.*

18. Large, heavy steel spouts from an ore dock had been unloaded from cars and piled in tiers of three, timbers being laid across or at an angle in the lower spouts to support the upper ones and to prevent them from nesting together. In the performance of his duty one of the unloading crew proceeded to remove various plates, burrs, and washers which had been left in the spouts. After removing them from the top spout of one tier he crawled into the middle spout and while removing a plate the top spout suddenly fell and crushed him. The top spout had been supported at one corner by the upper edge of the middle spout only. The jury found that deceased before climbing into the middle spout could by the exercise of ordinary care have learned the manner in which the top spout was then supported and have comprehended the danger of its falling upon him, and that a want of ordinary care on his part proximately contributed to his injury. *Held*, that the jury thereby found him guilty of contributory negligence and not of assumption of risk. *Ibid.*

19. In an action for injuries to an employee contributory negligence was a jury question upon evidence showing, among other things, that as he was walking in defendant's factory along a narrow path constructed of a thin coating of concrete laid on ashes, close to the edge of which was an excavation, the bank caved away causing him to fall into the excavation, that for weeks he and others had walked over the path safely, and that he knew of the excavation and of the thinness of the concrete, but not showing that he knew or even suspected the insecure condition of the bank under the concrete. *Ballard v. Thomas Furnace Co.* 386

Liability for injuries to third persons. See CORPORATIONS, 5, 6. MUNICIPAL CORPORATIONS, 2.

MATERIALMEN. See MECHANICS' LIENS, 2–4.

MAXIMS.
Expressio unius est exclusio alterius, 369.
Respondeat superior, 615, 618.

MECHANICS' LIENS.

Right to lien: Architects: Continuity of service.

1. In an action to enforce a mechanic's lien for services of architects, upon facts stated in the opinion it is *held* that the continuity of their services had been interrupted and that services rendered by them after the owner had accepted the building were not within the original contract of employment and did not extend the time within which a lien for services under the original contract could be filed. *Brust v. Lamoreux,* 142

Same: Subcontractors.

2. Where the principal contractor for the basement walls of a building purchased suitable materials from subcontractors, but constructed such walls therefrom in so improper and unsafe a manner that the walls were condemned by the building inspector and had to be torn out, the subcontractors were nevertheless entitled to liens under sec. 3315, Stats. *Houlahan v. Clark,* 110 Wis. 43, distinguished. *W. H. Pipkorn Co. v. Tratnik,* 91

3. The principal contractor was in such case the agent of the owner and acted within the scope of his authority in purchasing the materials, and his default in improperly using them—even though it might deprive him of the right to enforce a lien—did not affect the rights of the subcontractors in that respect any more than if the owner himself had improperly used such materials. *Ibid.*

Actions by subcontractors against school district: Priorities.

4. Nothing having been due from a school district to the principal contractor for a school house when subcontractors brought their several actions under sec. 3328, Stats., but, after consolidation of the actions, the district having paid into court a sum then admitted to be due and to which neither the district nor the principal contractor made any claim, a distribution of such sum *pro rata* among the plaintiffs was properly adjudged without priority according to the time of the commencement of the several actions. *Loomans Lumber Co. v. Mielke,* 311

Foreclosure: Findings of fact. See TRIAL, 12.

5. Findings of fact by the trial court in an action to foreclose mechanics' liens are, without discussion, *held* to have such support in the evidence that they cannot be set aside as being contrary to the clear preponderance thereof. *Sterling E. & C. Co. v. Berg,* 280

Same: Judgment: When dower right cut off.

6. The mechanic's lien statute does not authorize the cutting off of the inchoate dower right of the wife of the owner of the premises, where she did not know of or consent to the making of the improvements thereon. *W. H. Pipkorn Co. v. Tratnik,* 91

Same: Consolidation of actions: Parties.

7. An order consolidating several actions to foreclose mechanics' liens may afterwards, by an order *nunc pro tunc,* be corrected so as to bring in parties to one of the original actions who had been inadvertently omitted in the first order. *Sterling E. & C. Co. v. Berg,* 280

Same: Costs. See COSTS, 3, 4.

MENTAL CAPACITY. See GIFTS, 5.

MILWAUKEE CIVIL COURT. See ANIMALS, 5. APPEAL, 3. ARREST AND BAIL, 1. COSTS, 6.

MINES AND MINERALS. See TAXATION, 3.

MINORS. See APPEAL, 14. HIGHWAYS, 5. WORKMEN'S COMPENSATION, 1.

MISDESCRIPTION of land. See REFORMATION OF INSTRUMENTS, 2, 3.

MISREPRESENTATIONS. See FRAUD.

MISROUTING of freight: Liability. See CARRIERS, 1, 2.

MISTAKE. See OFFICERS. REFORMATION OF INSTRUMENTS. SCHOOLS AND SCHOOL DISTRICTS.

MODIFICATION.
Of contract. See VENDOR AND PURCHASER, 4.
Of decision, before judgment. See DIVORCE, 6.

MONEY PAID. See PAYMENT, 3.

MORTGAGES.

Transfer, as a gift. See GIFTS, 5, 6.

Sale of land: Assumption of mortgage by purchaser. See REFORMATION OF INSTRUMENTS, 1. SUBROGATION.

Payment by grantor of land. See SUBROGATION.

Foreclosure: Action against corporation: Pleading: Disclaimer. See CORPORATIONS, 7, 8.

Same: Judgment: Limitation of actions.

1. Where a mortgage securing a note contains a covenant to pay the amount named in the note, specifying it, the circuit court has jurisdiction, upon a complaint asking such relief, to render a personal judgment for damages upon such covenant and a judgment for foreclosure of the mortgage without provision for a deficiency judgment; and, in the absence of any objection at the trial or any request for an ordinary foreclosure judgment, defendant cannot afterwards complain that the judgment so rendered does not conform strictly to the foreclosure statute. *Ogden v. Bradshaw,* 49
2. Where a mortgage under seal contains a covenant to pay the debt secured thereby, neither the right to foreclose nor the right to a personal judgment for deficiency is barred until the expiration of twenty years from the time of default. *Ibid.*
3. Where the mortgage contains also a covenant by the mortgagor to pay taxes, damages for breach of such covenant may be added to the amount found due. *Ibid.*
4. The covenant in this case being to pay the sum specified in the note "with interest accruing thereon at the times and in the manner stated in said note," the note, though barred, may be taken to fix the terms of interest on the amount secured by the lien. *Ibid.*

Same: Solicitor's fee. See COSTS, 1.

5. An allowance, without evidence, of $200 as solicitor's fee on foreclosure of a mortgage for $4,500 on which the balance due was about $1,550, is reduced to $50. *Weigell v. Gregg,* 413

MOTIONS. See COSTS, 6. NEW TRIAL.

MOTIVE. See PROPERTY.

MUNICIPAL CORPORATIONS.

See TOWNS.

What are municipal corporations: Board of fire underwriters is not. See CORPORATIONS, 5.

1. A municipal corporation, as it exists in this state, is a body corporate consisting of the inhabitants of a designated area, created by the legislature, with or without the consent of such inhabitants, for governmental purposes, possessing local legislative and administrative power and power to exercise within such area so much of the administrative power of the state as may be delegated to it, and possessing limited capacity to own and hold property and to act in purveyance of public conveniences. *Sutter v. Milwaukee Board of Fire Underwriters,* 615
2. A board of fire underwriters incorporated pursuant to sec. 1922, Stats., is not a municipal corporation, and is liable for negligent acts of members of a fire patrol, established and controlled by it, in performing the duties of such patrol. *Ibid.*

Adoption of parts of general charter: When validity of adoption may be questioned.

3. A city incorporated by special act may adopt substantially the whole of the general charter plan relating to sewers (subch. XX, ch. 40*a*, Stats.), but has no power to adopt less. *Sayles v. Hartford,* 136
4. Sec. 926*a*, Stats.,—providing that no assumed adoption of the whole or any part of the general charter law shall be called in question or held invalid except in an action or proceeding brought directly for that purpose within three months after such assumed adoption,—relates to defects in the exercise of power, but does not apply where, as in this case, there is an absolute want of power. *Ibid.*

Powers: Granting franchises: Ordinance, when a contract as to rates: Regulation. See STREET RAILWAYS, 1, 2.

Same: Licensing engineers.

5. Power to regulate, given to a municipal corporation, ordinarily includes the power to license when necessary to proper regulation. *Milwaukee v. Filer & Stowell Co.* 426
6. Considered in connection with sec. 925—52*c*, Stats., relating to the construction of powers conferred upon cities of the first class, the power given to the city of Milwaukee "to provide for the inspection and regulation of stationary engines and boilers" includes power to require the licensing of engineers for such engines and boilers. *Ibid.*

Acquiring utilities. See PUBLIC UTILITIES.

Public improvements: Streets: Changing course of surface water.

7. A city has the right to change the natural course of surface water by improvements on its streets even though the flow of such water to and upon adjoining lands is thereby changed. *Stoecker v. Cedarburg,* 34

Same: Sewers: Special assessments. See MUNICIPAL CORPORATIONS, 11.

8. Sec. 926—15, Stats.,—providing that in cities of the third and fourth classes where the whole or any part of the cost of a sewer is to be paid by special assessments, certain proceedings shall be

had,—does not contain a grant of power, but is a mere regulation of the exercise of power where it already exists. *Sayles v. Hartford,* 136

9. Special assessments for public improvements cannot be levied upon private property unless by legislative authority and unless the prescribed method be followed in all substantial particulars. *Ibid.*

Torts: Flowing lands. See MUNICIPAL CORPORATIONS, 7.

Same: Defects in streets, etc. See HIGHWAYS, 6–15. TRIAL, 5.

Payments on illegal contracts: Taxpayers' action.

10. A general taxpayers' action to enforce the right and duty of a city to refuse to pay public money upon an illegal contract for improvements may be maintained even though some of the plaintiffs have, by their conduct or laches, estopped themselves from asking relief as to their private rights. *Sayles v. Hartford,* 136

11. If no estoppel is shown, the court may in such action deal with and protect also the individual rights of the parties to the record; but it should not restrain enforcement of special assessments against property of persons not before the court, and a judgment in general terms affecting such assessments may be construed and restricted so as not to apply to private property other than that of the parties. *Ibid.*

Actions by subcontractors. See MECHANICS' LIENS.

MUNICIPAL COURTS. See REFERENCE, 2.

MUTUALITY of contract. See BROKERS, 1. CORPORATIONS, 2.

NEGLIGENCE.

See APPEAL, 14. AUTOMOBILES. CARRIERS, 3. CORPORATIONS, 5, 6. HIGHWAYS, 3–6. MASTER AND SERVANT, 2–19. MUNICIPAL CORPORATIONS, 2. PLEADING, 3. RAILROADS, 2–8. STREET RAILWAYS, 21–24. TRIAL, 1. WHARVES.

1. In an emergency, where there is no time for the exercise of judgment and deliberate action upon it, a failure to take the best means to avoid an injury is not necessarily negligence. *Parkes v. Lindenmann,* 101

2. The evidence in this case, though largely circumstantial, is *held* to support a verdict to the effect that defendant, while repairing a service pipe, negligently permitted gas to escape into plaintiff's greenhouse, thereby causing injury to her plants. *Guillaume v. Wisconsin-Minnesota L. & P. Co.* 636

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES.

NEWSPAPERS. See LIBEL AND SLANDER, 3–10.

NEW TRIAL.

See APPEAL, 17, 18.

1. The plaintiff in an action for unliquidated damages cannot retain the advantage gained by a verdict in his favor and at the same time have a new trial for the purpose of increasing or adding to the damages assessed in such verdict. [Whether such a practice, even if authorized by statute, would be due process of law is doubted.] *Banaszek v. F. Mayer Boot & Shoe Co.* 404

2. Under sec. 2878, Stats., a motion for a new trial on the judge's minutes, made but not decided during the term at which the trial was had, must be deemed constructively overruled. *Koenig v. Sproesser,* 8

NONRESIDENTS: Situs of income. See TAXATION, 5–8.

NONSUIT. See HIGHWAYS, 14. PAYMENT, 4.

NONSUPPORT. See HUSBAND AND WIFE, 2, 3.

NOTICE.
Of oral agreement affecting note. See BILLS AND NOTES.
Of intention to stop horses in transit. See CARRIERS, 2.
Of danger from suitcase in rack. See CARRIERS, 3.
Of foreclosure proceedings. See CORPORATIONS, 7.
To disconnect electric wires. See LANDLORD AND TENANT, 3.
Of fraud. See PARTNERSHIP, 2.
Of defects in goods. See SALES, 2.
That town is acting under certain statute: When binding. See TOWNS, 3.

NOVATION. See BILLS AND NOTES.

NUISANCE.

1. Where the operation of a roller skating rink, though involving considerable noise, is not physically annoying to persons of ordinary sensibilities, it is not a nuisance and the courts should not interfere therewith by injunction. *Wahrer v. Aldrich,* 36

2. Where such a rink is located near the business center of a city, the rule applicable to one situated in a strictly residence district cannot be applied. *Ibid.*

NUNC PRO TUNC. See MECHANICS' LIENS, 7.

OBSTRUCTION of highway. See WATERS, 4.

OFFERS OF SETTLEMENT. See EVIDENCE, 5, 6.

OFFICERS.

Qualification: Bonds: Omissions. See SCHOOLS AND SCHOOL DISTRICTS.
Where the intent is clear and undisputed, a mere omission to insert words intended and authorized to be inserted cannot be held to defeat an official bond which all parties have treated as valid. *State ex rel. Dorwin v. White,* 170

Construction of statutes by officers and boards. See STATUTES.

Compensation: Traveling expenses. See TOWNS, 2.

Malfeasance in office. See TOWNS, 1, 2.

Clerk of circuit court. See COSTS, 2. JUDGMENT, 2.

District attorney. See DISTRICT ATTORNEYS.

Town supervisors. See TOWNS, 1, 2.

School district treasurer. See SCHOOLS AND SCHOOL DISTRICTS.

OFFICIAL BONDS. See OFFICERS. SCHOOLS AND SCHOOL DISTRICTS.

OPINION EVIDENCE: Experts. See MASTER AND SERVANT, 9.

OPINIONS. See FRAUD, 1–4.

OPTIONS. See CONTRACTS, 4. LANDLORD AND TENANT, 4.

ORDINANCES. See STREET RAILWAYS, 1, 2.

OUSTER. See TURNPIKES AND TOLL ROADS, 3.

PARENT AND CHILD. See GIFTS, 5, 6.

PAROL AGREEMENTS. See EVIDENCE, 11–13. FRAUDS, STATUTE OF, 2.
PARTIES. See CONSPIRACY, 3. MECHANICS' LIENS, 7. MUNICIPAL CORPORATIONS, 10, 11. PUBLIC UTILITIES, 12. TAXATION, 16, 21–24.

PARTNERSHIP.

Action against surviving partner: Accounting: Fraud: Laches.

1. In an action by a widow, as executrix, against a surviving partner of her deceased husband for an accounting and for cancellation of certain conveyances, a complaint alleging that defendant wilfully concealed partnership property from plaintiff; that he falsely claimed that deceased owed the firm $500; that by means of a false and incomplete list of partnership property he procured an undervaluation thereof by the appraisers; and that by false representations he had induced plaintiff and the guardian of her minor child to join in selling the partnership assets, ostensibly to a third person but in fact to defendant himself, is *held* to state a cause of action based on fraud. *McCartney v. Boyd,* 146
2. Delay in bringing such action for a year after plaintiff was appointed executrix and discovered the fraud was not *per se* laches, especially in the absence of any showing that defendant was injured thereby. *Ibid.*
3. A partnership accounting being the main purpose of the action, the prayer for the ancillary remedy of cancellation of the conveyances made by the plaintiff individually did not show a misjoinder of causes of action. *Ibid.*

PARTY WALLS.

Where plaintiff and defendants, who owned adjoining lots and had the right to use in common a three-foot strip of which the fee was in defendants, duly executed a written agreement by which plaintiff, who was about to erect a three-story building, was given the right to build a party wall in accordance with her plans and specifications, partly upon said strip and partly on defendants' land, and it was provided that such wall should be "of sufficient strength to be used for and constitute the west wall of first party's brick building she is to erect and also the east wall of any brick building of a like number of stories or less which second parties . . . may hereafter build upon their lot," such agreement, together with the construction of the wall and the subsequent acts of the parties, defined and fixed their respective rights as to the three-foot strip and the beneficial use thereof during the existence of the buildings contemplated by the agreement, apportioning between them, in accordance with the location of the party wall, the areas on the several floors not occupied by common stairways and passageways. *Lyons v. Rossmeissl,* 198

PASSENGERS: Injury. See CARRIERS, 3.

PAYMENT.

Place and mode: Mail remittance.

1. Where a contract for the payment of money is silent as to the place of payment, in the absence of any legitimate inferences to the contrary the law implies that payment shall be made at the residence, office, or place of business of the creditor, if within the state. *State ex rel. Gurney L. Co. v. Risjord,* 118

2. Payment by mail remittance is not such an established and generally recognized usage of trade that by implication it becomes part of a contract for the repair in one county of a machine owned by a corporation having its place of business in another county. *Ibid.*

Payment to agent: Authority: Trust companies. See PRINCIPAL AND AGENT.

Cancellation of debt by failure to file affidavit as to sale under chattel mortgage. See VENDOR AND PURCHASER, 5.

Payment on order drawn: Judgment: Amount of credit.

3. With the consent of the owner a contractor drew an order upon him in favor of a subcontractor for the amount due to the latter, which was less than the owner owed the contractor. The owner refused to pay the order, but afterwards paid a judgment entered against him thereon with costs. *Held*, that as against the contractor who drew the order the owner was entitled to credit for the original amount thereof only. *Sterling E. & C. Co. v. Berg*, 280

Recovery of money paid: Breach of contract. See VENDOR AND PURCHASER, 8, 9.

Same: Duress.

4. Where in an action to recover money alleged to have been paid under duress there was evidence that plaintiff, an innocent man, who had been found in a somewhat compromising situation with a married woman, was repeatedly threatened by the district attorney with prosecution and conviction of adultery, and under the stress of such threats gave his note for $800 to settle the matter, after which he went to a distant state, procured the money, and paid the note within twenty days, believing that the prosecution would proceed if he did not, it could not be said as matter of law that there was no duress in such payment, and a nonsuit was improper. *Coon v. Metzler*, 328

5. To constitute duress a person must be so strongly influenced that his acts are not the result of his own will; but acts or threats which might fall short of duress under certain conditions might be ample under others, much depending on the situation of the parties, their relations to each other, physical and mental strength, and all the surrounding circumstances. *Ibid.*

6. The mere fact that several days elapsed between the making of threats and the payment of money does not conclusively negative duress in such payment. *Ibid.*

7. Threats of prosecution made by a district attorney differ materially from similar threats made by a layman or private attorney in that they bear the added weight of the power vested in that officer to institute, and to a certain extent control, criminal prosecutions. *Ibid.*

Payment into court. See JUSTICES' COURTS, 8. MECHANICS' LIENS, 4.

PERFORMANCE of contract. See BROKERS. PLEADING, 2. SALES, 1. VENDOR AND PURCHASER, 3, 8, 9.

PERSONAL INJURIES. See ANIMALS, 3–5. AUTOMOBILES. CARRIERS, 3. DAMAGES, 2, 3. DEATH. HIGHWAYS, 4, 10, 14, 15. MASTER AND SERVANT, 5, 6, 9–19. PLEADING, 3, 4. RAILROADS, 5, 6. STREET RAILWAYS, 21–24. WHARVES.

PERSONAL PROPERTY. See DIVORCE, 4. EXECUTORS AND ADMINISTRATORS, 1, 3. EXEMPTIONS. GIFTS. PROPERTY. PUBLIC UTILITIES, 14. SALES. TRUSTS AND TRUSTEES, 1, 2.

PERVERSE VERDICT. See APPEAL, 7, 8. HIGHWAYS, 3. TRIAL, 1.

PHYSICIANS AND SURGEONS. See WITNESSES, 3.

PLACE OF PAYMENT. See PAYMENT, 1.

PLACE OF TRIAL. See VENUE.

PLANK ROADS. See TURNPIKES AND TOLL ROADS.

PLEADING.

Construction: Definiteness.

1. Pleadings must be liberally construed, and proof is admissible under pretty broad general allegations, the remedy of the opposite party in such a case being to move to make the pleading more definite and certain. *Wood v. General Railway S. Co.* 71

Complaint: Sufficiency. See CONSPIRACY, 2. CORPORATIONS, 7, 8. DEATH, 2. DIVORCE. FRAUD, 6, 7. LIBEL AND SLANDER, 5. MASTER AND SERVANT, 10. PARTNERSHIP, 1.

Same: Joinder of causes of action. See CONSPIRACY, 2. PARTNERSHIP, 3.

Answer: Counterclaim. See COSTS, 1. DISMISSAL AND NONSUIT, 1.

2. Defendants having alleged that it was agreed that performance of a second contract upon which they based their counterclaim should extinguish the plaintiff's claim for damages under the contract sued on, failure to produce evidence in support of such allegation did not preclude defendants from proving their counterclaim and not only recovering the amount due thereon but putting at rest plaintiff's adverse claim. *Boutin v. Andreas,* 152

Amendment. See CONTINUANCE. DIVORCE, 2. GARNISHMENT, 2, 3.

3. In an action for injuries to a railway employee the complaint alleged as negligence the violation of a rule of the defendant company by another employee. At the trial defendant admitted the rule had been violated, but claimed that in violating it the other employee had acted outside the scope of his authority, and that defendant was not liable for his acts. Against objection, plaintiff then introduced evidence that the rule had been abrogated by long-continued practice to the contrary and acquiescence therein by defendant, and afterwards the complaint was ordered amended so as to allege that the rule had been abrogated. Defendant made no affidavit of surprise. *Held,* that the matter rested in the discretion of the trial court, and that the error, if any, in admitting said evidence before amendment of the complaint was in this case harmless. *Callahan v. Chicago & N. W. R. Co.* 288

4. In an action for injuries to a railway employee the complaint did not allege that he was engaged in interstate commerce at the time of his injury, but the answer alleged and the undisputed evidence showed that fact, and the court submitted the case to the jury as one covered by the federal statute. *Held,* that there was no error in such submission and that the complaint should be treated as amended as of course to conform to the proofs. *Ibid.*

5. The complaint in an action for death of a person alleged to have been caused by a defect in a highway asked $5,000 as damages, but at the trial an amendment changing the amount to $10,000 was allowed. Upon the argument to the jury plaintiff's counsel stated that there might be some question as to the right to recover more than $5,000, and that plaintiff would be content with that sum. Objection to such argument being sustained, plaintiff was allowed to amend the complaint again so as to reduce the amount claimed to $5,000. *Held*, that the first amendment was properly allowed, and the allowance of the second was not prejudicial to the defendant. *Schroeder v. Watertown*, 13

Issues, proof, and variance. See CONTINUANCE. MASTER AND SERVANT, 10. PLEADING, 3, 4.

PLEDGES. See BILLS AND NOTES.

POSSESSION.
Of notes, etc.: Authority to receive payment. See PRINCIPAL AND AGENT, 1.
Of toll road: When adverse. See TURNPIKES AND TOLL ROADS.

PRACTICE: Simplification. See APPEAL, 4.

PRELIMINARY INJUNCTION. See BANKRUPTCY, 2. LANDLORD AND TENANT, 3.

PRESUMPTIONS. See APPEAL, 11. RAILROADS, 8. REMOVAL OF CAUSES, 2. TURNPIKES AND TOLL ROADS, 1. WORKMEN'S COMPENSATION, 13.

PRINCIPAL AND AGENT.

See BROKERS. CORPORATIONS, 1–3. GIFTS, 2. MECHANICS' LIENS, 3.

Authority to receive payment: Possession of notes: Trust companies.

1. The mere fact that an agent has not possession of notes or securities at the time of payment is not conclusive that he has no authority to receive such payment. *Weigell v. Gregg*, 413
2. In view of the broad statutory powers of trust companies and the universal custom of dealing with them as principals, though known to be agents or trustees, their authority to act need not be established by the same strict rules that obtain in case of individuals. *Ibid.*
3. As against persons who in good faith and without negligence have relied upon the authority of a trust company to act in a business matter of which, to the knowledge of its principal, it has assumed full charge, such principal must be held bound by acts of the company which, though in excess of its express authority, are not unusual and are fairly germane to the subject matter intrusted to it. *Ibid.*
4. A note and mortgage given by defendant to a trust company, payable to it at its offices, were sold and delivered to plaintiff. Defendant paid the interest to the trust company for five years. Then, by written agreement between defendant and the trust company as agent for the owner (whose identity was not disclosed), the time for payment was extended, defendant agreeing therein to pay the principal and interest to the trust company as agent. Plaintiff consented to this agreement. Afterwards defendant paid interest and also, before it was due, a part of the principal to the trust company. *Held*, that plaintiff had given the trust company apparent authority to receive such payments and was bound thereby. *Ibid.*

PRINCIPAL AND SURETY. See EXECUTORS AND ADMINISTRATORS, 2. GARNISHMENT, 2–4.

PRINTED CASE. See APPEAL, 12.

PRIVILEGE. See LIBEL AND SLANDER, 7, 8.

PRIVILEGED COMMUNICATIONS. See WITNESSES, 3.

PROCESS: Service of summons. See JUSTICES' COURTS, 3–5.

PROMISSORY NOTES. See BILLS AND NOTES.

PROOF OF SERVICE. See JUSTICES' COURTS, 3–5.

PROPERTY.

As a general rule, whatever a man may lawfully do on his own property under any circumstances, he may do regardless of the motive for his conduct. *People's L. & M. Co. v. Beyer*, 349

PROSECUTING ATTORNEYS. See DISTRICT ATTORNEYS.

PROXIMATE CAUSE. See HIGHWAYS, 14. INSTRUCTIONS TO JURY, 3. LIBEL AND SLANDER, 2. TRIAL, 5. WORKMEN'S COMPENSATION, 3, 6–9.

PUBLICATION of summons. See JUSTICES' COURTS, 3.

PUBLIC IMPROVEMENTS. See MUNICIPAL CORPORATIONS, 3, 7–11.

PUBLIC UTILITIES.

See RAILROADS. STREET RAILWAYS.

Taking by city: Action to determine necessity: Judgment: Appeal.

1. In the action, provided for in sec. 1797*m*—80, Stats. 1913, to obtain an adjudication as to the necessity of the taking by a municipality of the existing plant of a public utility, no judgment is provided for or contemplated, and no appeal lies from the verdict of the jury or the finding of the court; nor, if a judgment be in fact entered, can an appeal be taken therefrom. *Menasha v. Wisconsin T., L., H. & P. Co.* 605

Same: Valuation: Elements of value.

2. In the valuation of a public utility for condemnation or sale purposes, the essential elements usually to be considered are the present value of its physical property, the present and prospective reasonable earnings of its business, the going value thereof, and the amount of money presently needed to put the plant in good condition. *Oshkosh W. W. Co. v. Railroad Comm.* 122

3. In determining the value of the physical property due regard should be had to the original cost thereof, the reproduction cost, the amount of depreciation, and the amount of obsolescence. *Ibid.*

4. The "going value" of a utility is that part of its value due to its having an existing established business. In fixing its amount the actual cost of establishing the utility in question as modified by what under all the circumstances ought to have been its reasonable cost, as well as the reasonable cost of establishing like enterprises under similar conditions, may be considered. *Ibid.*

5. Since the valuation of a utility cannot be reduced to absolutely fixed rules or to the mere appraisal of parts whose sum equals its value, but involves the exercise of sound and competent business judgment upon many elements of uncertain and debatable

value, grave errors in arriving at and seriously affecting the final result must be shown before a valuation by the railroad commission will be set aside. *Ibid.*

6. In determining the value of a utility a consideration of reproduction cost is profitable and proper only in so far as it will aid in determining the ultimate fact to be ascertained, namely, the just present value of the utility as an entity. *Ibid.*

7. Generally, cost less depreciation will fairly represent value; for that reason cost is an important element in determining value, and reproduction cost is also important, but there may be elements that enter into both cost and reproduction cost that do not enhance value. *Ibid.*

8. Thus, in determining the value of waterworks, the extra cost of reproducing under paved streets water pipes which were laid before the paving was done, was in this case properly disregarded. *Ibid.*

9. The original investment is a valuable aid in determining the present value of a utility, but it is not controlling. *Ibid.*

10. Earnings, if derived from a reasonable rate, are important factors in determining the value of a utility, but are not in themselves conclusive. *Ibid.*

Same: Outstanding bonds: Rights of bondholders: Order for payment.

11. It is the property of a utility which is to be purchased by a city, not a mere equity of redemption therein; and where bonds secured by a trust deed of the property were outstanding when the compensation was fixed, but might be called at any time upon payment of a premium, and the compensation fixed was more than sufficient to pay the full amount of the bonds including the premium, the railroad commission properly ordered the company to call in and cancel the bonds and turn the utility over to the city free from all liens. *Oshkosh W. W. Co. v. Railroad Comm.* 122

12. No rights of the bondholders being adversely affected by such order, they were not necessary parties to the proceedings. *Ibid.*

13. The company in such a case is not entitled to receive the compensation without calling in the bonds. When it accepted an indeterminate permit it agreed to sell to the city at any time the latter might elect; and the city is under no obligation to assume the company's obligations or to pay anything more than the full value of the utility. *Ibid.*

Same: Taxes by whom to be paid.

14. The property of a waterworks company being, under sec. 51.43 (p. 845) Stats. 1913, deemed personal property for purposes of taxation, the taxes thereon based upon the assessment made on May 1st were properly payable by the company, not by the city, although the city purchased the property and took possession thereof in the following October. *Oshkosh W. W. Co. v. Railroad Comm.* 122

Same: Annual tax, when unnecessary: Constitutional law.

15. The provision of sec. 3, art. XI, Const., that a city acquiring a public utility shall provide for the collection of a direct annual tax to pay therefor, is for the protection of the utility; and when it appears that the city has the money on hand and has made law-

ful tender thereof to the utility, a noncompliance with the provision becomes a harmless error. *Oshkosh W. W. Co. v. Railroad Comm.* 122

Same: Review of decision of railroad commission.

16. In an action under sec. 1797*m*—83, Stats. 1913, to review an order of the railroad commission fixing the compensation to be paid by the city for the taking of the property of a public utility, the finding by the trial court that the compensation fixed by the commission is "lawful" is a finding that it is just and adequate, and shows that the court passed upon the question of value as an original question of fact. *Oshkosh W. W. Co. v. Railroad Comm.* 122

17. Under sec. 1797*m*—84, the compensation fixed by the commission must stand unless the plaintiff "shall establish to the full satisfaction of the court . . . that such compensation is unlawful," etc., and this does more than merely throw the burden of proof upon plaintiff, since it requires more than a preponderance of the evidence. *Ibid.*

QUALIFICATION: Official bonds. See OFFICERS. SCHOOLS AND SCHOOL DISTRICTS.

QUANTUM MERUIT. See EVIDENCE, 6. GARNISHMENT, 2.

RAILROAD COMMISSION. See PUBLIC UTILITIES, 2–17. STREET RAILWAYS, 3–20.

RAILROADS.

See STREET RAILWAYS.

Condemnation of land. See EMINENT DOMAIN, 3–5.

Operation: Statutory regulations: Headlights.

1. Whether sec. 1809*v*, Stats., relating to locomotive headlights, is unconstitutional, is not decided. *Smith v. Chicago & N. W. R. Co.* 560

Rules and regulations of company: Violation. See MASTER AND SERVANT, 12, 13. PLEADING, 3.

Misrouting of freight: Liability. See CARRIERS, 1, 2.

Injuries to passengers. See CARRIERS, 3.

Injuries to persons on track: Contributory negligence.

2. A licensee walking along the track of a railway is bound to exercise ordinary care for his own protection, and contributory negligence on his part will defeat a recovery for injuries caused by negligence of the railway company. *Zemke v. Chicago & N. W. R. Co.* 358

3. Assuming in this case, but not deciding, that a man who, while walking along railway tracks in violation of sec. 1811, Stats., was struck and killed by a switch engine either upon or just after crossing a viaduct, was a licensee and not a mere trespasser, the evidence is *held* to show, as matter of law, that he was guilty of contributory negligence. *Ibid.*

4. The fact that many other persons had traveled along the tracks in the same way was not sufficient to raise an issue on the question of the contributory negligence of the deceased, he having voluntarily and without overmastering necessity exposed himself to great and apparent hazard. *Ibid.*

5. An employee of an express company who was struck and injured by a train alleged to have been run into a station at an excessive rate of speed without giving appropriate signals, is *held*, as a matter of law, to have been guilty of contributory negligence upon evidence showing, among other things, that he was familiar with the surroundings and knew that the train was likely to come in soon on the track in question; that the station was well lighted; that he had walked 200 feet beside the track without looking back, and then stepped into the zone of danger when the engine was just behind him. *Smith v. C. & N. W. R. Co.* 560

Injury to boy catching ride.

6. In an action for injuries to a boy who was run over on defendant's track either—as he claimed—after a train had been parted into two sections and he was trying to cross the track in front of the rear section, which he supposed was at rest, or—as defendant claimed—when he attempted to catch a ride on the moving cars before the train was parted, it is *held* that the trial court was not clearly wrong in deciding that the evidence conclusively showed that the injury occurred before the train was parted, and in changing the special verdict accordingly and rendering judgment for defendant on the ground that there was no proof of negligence on its part. *Delvaux v. K., G. B. & W. R. Co.* 554

Injury to trespasser riding in engine cab.

7. One who enters the cab of a railway engine for the purpose of getting a free ride in violation of Wis. Stats., secs. 1797—1 to 1797—38, and 36 U. S. Stats. at Large, 546, ch. 309, becomes thereby a trespasser, although the engineer makes no objection; and for his death caused by explosion of the boiler while he is so riding there can be no recovery, in the absence of wilful or gross negligence on the part of the engineer. *Spencer v. Chicago, M. & St. P. R. Co.* 474

8. In view of the law prohibiting such free passage, and it being common knowledge that the engine cab is for the exclusive use of the engine crew, a person attempting to ride free therein is presumed to know that the engineer has no authority to permit him to do so, and to wilfully commit an unlawful act. *Ibid.*

Injuries to employees. See MASTER AND SERVANT, 2, 3, 12, 13. PLEADING, 3, 4.

RATES of fare: Regulation. See STREET RAILWAYS, 1–20.

RATIFICATION of franchise ordinance. See STREET RAILWAYS, 2.

REAL-ESTATE BROKERS. See BROKERS. TRIAL, 9.

REAL PARTY IN INTEREST. See TAXATION, 16, 21.

REAL PROPERTY. See CONSPIRACY, 2, 3. DEEDS. DIVORCE, 4. EMINENT DOMAIN. EVIDENCE, 13. FRAUD. FRAUDS, STATUTE OF. HIGHWAYS, 1. HOMESTEAD. LANDLORD AND TENANT. MECHANICS' LIENS. MORTGAGES. PARTNERSHIP. PARTY WALLS. PROPERTY. REFORMATION OF INSTRUMENTS, 1. SUBROGATION. TAXATION, 3, 21–24. VENDOR AND PURCHASER. WATERS. WILLS, 2–6.

REDEMPTION from tax sale. See TAXATION, 24.

REFERENCE.

1. How long an account must be in order to justify a compulsory reference is largely a matter of judgment and sound discretion on the part of the trial court. In this case, an account of

twenty-nine items for legal services and disbursements, covering a period of about forty days, justified such a reference. *Astor Co. v. Dengel*, 1

2. By sec. 56, ch. 23, Laws 1907, the municipal court of Outagamie county is given power to order a compulsory reference under sec. 2864, Stats. The proviso in sec. 2864 relating to municipal courts applies only to references by consent. *Ibid.*

REFORMATION OF INSTRUMENTS.

1. Reformation of a contract for the conveyance of land to defendants was properly adjudged in this case, the evidence being clear, convincing, and satisfactory that by mistake the contract did not express the agreement of the parties in that it failed to state that defendants assumed a mortgage upon the land. *Pedersen v. Hansen*, 355

2. A finding of the trial court that by mutual mistake of the parties there was a misdescription of the premises intended to be covered by a lease is *held* to be sustained by the evidence. *Gimbel Brothers v. Tolman*, 382

3. Delay in commencing an action for correction of the misdescription of premises in a lease did not constitute laches where plaintiff was in peaceable possession of the disputed premises, with defendants' consent, and the rights of innocent parties were in no way prejudiced. *Ibid.*

REMEDIES.
Statutory remedies: When not exclusive. See ACTION. TAXATION, 13–15.
Legal or equitable? See EMINENT DOMAIN, 5. INJUNCTION. LANDLORD AND TENANT, 4. VENDOR AND PURCHASER, 6, 7. WILLS, 5.
On mortgage, after note outlawed. See MORTGAGES, 1–4.
Taxpayers' action: Protection of public and individual rights. See MUNICIPAL CORPORATIONS, 10, 11.

REMOVAL OF CAUSES.

1. A suit commenced in a state court in a federal district of which neither plaintiff nor defendant is a resident, though they reside in different states, cannot be removed to the federal court of the state wherein the action is pending, because such federal court had no jurisdiction of the original suit. *Gist v. Equitable Surety Co.* 79

2. Under the statute governing removal of cases from state to federal courts, the citizenship and residence of a corporation are conclusively presumed to be the state of its incorporation, and are limited thereto even though it may have been licensed to do business in another state. *Ibid.*

REOPENING CASE. See JUDGMENT, 3.

RES GESTÆ. See EVIDENCE, 1, 2, 8, 10.

RESIDENCE. See REMOVAL OF CAUSES.

RESTRICTIONS on use of land. See VENDOR AND PURCHASER, 3.

RETURN of service. See JUSTICES' COURTS, 3–5.

REVIEW. See APPEAL, 5–16. PUBLIC UTILITIES, 16, 17. STREET RAILWAYS, 16–20. WORKMEN'S COMPENSATION, 16–21.

ROADS AND STREETS. See EMINENT DOMAIN, 1, 2. HIGHWAYS. INJUNCTION, 5. LANDLORD AND TENANT, 4. MUNICIPAL CORPORATIONS, 7. TRIAL, 5.

ROLLER SKATING RINK. See NUISANCE.

RULES OF COURT.
Supreme Court Rule 6 (Printed case), 176, 179.
Supreme Court Rule 64 (Opinions), 284.
Circuit Court Rule XV (Tender and payment into court), 413, 420.

RULES AND REGULATIONS of railway companies: Violation. See MASTER AND SERVANT, 12, 13. PLEADING, 3.

SAFETY of working place, etc. See MASTER AND SERVANT, 3–9.

SALES.

Performance of contract.

1. Plaintiffs were not entitled to recover for the making of a silo form for defendants, the jury having found that the form was not constructed according to the agreement of the parties, and there being evidence that it varied substantially from such agreement. *Leach v. Koch,* 236

Same: Acceptance of goods.

2. A purchaser of vacuum cleaners who retained them for two months before intimating that they were not satisfactory, and thereafter allowed two weeks to elapse before returning them, must, under sec. 1684*t*—48, Stats. 1913, be deemed to have accepted them. *Ohio E. Co. v. Wisconsin-Minn. L. & P. Co.* 632

Warranties: Order by trade-name.

3. Where, by written order and acceptance, vacuum cleaners were purchased merely by their known trade-name, without other specification, there was, under sec. 1684*t*—15, Stats. 1913, no implied warranty of fitness. *Ohio E. Co. v. Wisconsin-Minn. L. & P. Co.* 632

Sales by trustee in bankruptcy: Exclusive right to advertise. See BANKRUPTCY.

SALES FOR TAXES. See TAXATION, 3, 21–24.

SALES OF LAND. See BROKERS. DEEDS. EVIDENCE, 13. FRAUD. FRAUDS, STATUTE OF. REFORMATION OF INSTRUMENTS. SUBROGATION. VENDOR AND PURCHASER.

SCHOOLS AND SCHOOL DISTRICTS.

See MECHANICS' LIENS, 4.

In the bond of a school district treasurer, duly executed by him and by his sureties and duly filed and approved, the amount of the penalty was not inserted, the proper amount not yet having been determined; but said treasurer and sureties intended to give and believed they gave the statutory bond, and they expected and authorized the director and clerk of the district to ascertain the proper amount as required by law and to insert the same in the blank space left therefor in the bond. *Held,* that the failure of the director and clerk so to do did not defeat the bond or prevent the treasurer from duly qualifying. *State ex rel. Dorwin v. White,* 170

SCIENTER. See ANIMALS, 3.

SERVICE OF SUMMONS. See JUSTICES' COURTS, 3–5.

SETOFF AND COUNTERCLAIM. See COSTS, 1. DISMISSAL AND NONSUIT, 1. PLEADING, 2.

SETTLEMENT. See EVIDENCE, 5, 6. HUSBAND AND WIFE, 1. TAXATION, 24.

SEWERS. See MUNICIPAL CORPORATIONS, 3, 8.

SHERIFFS AND CONSTABLES: Return of service. See JUSTICES' COURTS, 3–5.

SIDEWALKS. See HIGHWAYS, 9, 12.

SITUS of property or income. See TAXATION, 5–8.

SLANDER. See LIBEL AND SLANDER, 1, 2.

SPECIAL ASSESSMENTS. See MUNICIPAL CORPORATIONS, 8–11.

SPECIAL BENEFITS. See EMINENT DOMAIN, 2. HIGHWAYS, 1.

SPECIAL VERDICT. See TRIAL, 2–11.

STATE AND FEDERAL COURTS. See REMOVAL OF CAUSES.

STATES: Powers. See TAXATION, 2.

STATUTE OF FRAUDS. See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS. See MORTGAGES, 2. MUNICIPAL CORPORATIONS, 4. WILLS, 2–5.

STATUTES.

Constitutionality. See JUSTICES' COURTS, 1. NEW TRIAL, 1. RAILROADS, 1. TAXATION, 1–3, 10.

Construction. See ACTION. ANIMALS, 3. APPEAL, 3, 4, 17, 18. CORPORATIONS, 7. COSTS, 2, 4. DIVORCE, 1, 4. EMINENT DOMAIN, 2, 3. EXEMPTIONS. FRAUDS, STATUTE OF. HIGHWAYS, 1, 13. HOMESTEAD, 3, 4. HUSBAND AND WIFE, 3. INTEREST. JUSTICES' COURTS, 1, 3, 4. MASTER AND SERVANT, 5, 9, 15. MECHANICS' LIENS, 2, 4, 6. MUNICIPAL CORPORATIONS, 3–6, 8. NEW TRIAL, 2. PUBLIC UTILITIES, 1, 14–17. RAILROADS, 3, 7. REFERENCE. REMOVAL OF CAUSES. SALES, 3. STREET RAILWAYS, 1, 2, 19. TAXATION, 1, 7–19, 24. TOWNS. TRUSTS AND TRUSTEES, 1, 6. VENDOR AND PURCHASER, 5. VENUE. WITNESSES. WORKMEN'S COMPENSATION.

The rule that weight should be given by the courts to the construction of a statute by the officers or department whose duty has been to execute it, does not apply where there is no ambiguity in the statute; nor does it apply to the erroneous rulings of inferior tribunals so as to control or affect the decision of the superior tribunal having by law the power and duty to review directly such rulings. *Smith v. State,* 588

State or federal statute governing? See MASTER AND SERVANT, 2, 3. PLEADING, 4.

STOCK AND STOCKHOLDERS. See CORPORATIONS. EVIDENCE, 1.

STOCK IN TRADE. See EXEMPTIONS.

STREET RAILWAYS.

Regulation of rates: Franchise contract: Power of state.

1. A municipal ordinance, enacted under the authority of sec. 1862, Stats., and its acceptance by a street railway company, even if they constituted a valid contract empowering the company to charge a five-cent fare, did not abrogate the right of the legisla-

ture, acting directly or through the railroad commission, to regulate the rates. The contract in such a case remains valid only until the state sees fit to exercise its paramount power of regulation. *Duluth St. R. Co. v. Railroad Comm.* 245

Same: Validation of franchise by legislature.

2. Sec. 247, ch. 124, Laws 1891, repealing the original charter of the city of Superior (ch. 152, Laws 1889), but providing that nothing in the repealing act "shall be held to impair any of the rights granted by said city" to the street railway company, that the ordinance granting the same is "ratified, confirmed and validated," and that ordinances not repealed were to continue and remain in force "until altered, amended, repealed or suspended by the common council in pursuance of this act," did not make the ordinance granting rights to the street railway company a law of the state, nor constitute a contract between the state and the company fixing the rate of fare to be charged by the company during the term of its franchise. It merely preserved existing rights granted by the city and cured any defect that might exist in the manner of granting the franchise. *Duluth St. R. Co. v. Railroad Comm.* 245

Same: Reasonableness of rates: Valuation of property.

3. In ascertaining whether rates of fare charged by a street railway company are reasonable or otherwise, net earning power is one of the most important elements to be considered. Where rates are so adjusted as to yield a fair return on the value of the property over and above expenses and depreciation they are reasonable; where they are so fixed as to materially exceed this sum, they are not. *Duluth St. R. Co. v. Railroad Comm.* 245

4. The failure to take into account, in fixing the rates of fare to be charged for street railway service in Superior, alleged economies in operation by reason of the street railway lines in Superior and Duluth being under one management and control and supplied with power from a single plant, is *held* to have been justified by the evidence, which tended to show that the amount so saved was so small as to be negligible. *Ibid.*

5. A valuation of street railway property for taxation purposes (which may be larger because an excessive amount is being earned) is not conclusive as to its value for rate-making purposes; but it may well be that after the state has fixed a value for the latter purpose and restricted the earning power of the road to a reasonable return on such value, it should not fix a materially higher value for purposes of taxation. *Ibid.*

6. In fixing a value for rate-making purposes the railroad commission correctly considered the cost of reproduction, the fact that the street railway company was a going concern having an established business, the fact that it would have the right to continue to carry on the business in the future, and, to some slight extent, the original cost of the property less depreciation, treated them as inseparable parts of one harmonious entity, and fixed a value on the property as an entirety, giving due importance to reproduction cost. No erroneous elements were included in fixing a value as indicated and no essential elements were excluded. *Ibid.*

7. An inventory of the property of a street railway system, made for the owner at the time such owner purchased the system, together with a subsequent cost appraisal by engineers of the railroad commission,—all constituting one of the files in the office of the

commission at the time of the hearing,—although not formally offered in evidence, was properly considered by the commission in valuing the street railway property for the purpose of fixing rates. *Ibid.*

8. When the value of the property of a street railway company, operating under an indeterminate permit and entitled to charge only reasonable rates, is fixed on the theory that the business is a going one and that the owner will be permitted to carry it on in the future unless the municipality elects to buy it for full and fair value, all proper allowance is thereby made for franchise value. *Ibid.*

9. An allowance by the railroad commission, in valuing street railway property for rate-making purposes, of only twelve per cent. of the reproduction cost, to cover cost of engineering, interest on money during construction, mistakes, and unforeseen contingencies, having support in the evidence and having been approved by the trial court, is sustained on appeal. *Ibid.*

10. Where the railroad commission determined what it would cost to reproduce a street railway plant in the condition it was at the time of the hearing, this necessarily included the cost and value of co-ordinating the plant into a harmonious entity. *Ibid.*

11. Where, in a proceeding to fix the rates of fare to be charged by a street railway company, an attempt was made to ascertain the original cost of the property and also what it was worth after making deductions for depreciation, certain alleged omissions and undervaluations were unimportant, it appearing that they had no substantial effect on the final determination by the railroad commission, which was more largely based upon the reproduction cost less depreciation, with an allowance for going value, and there being no claim that in ascertaining such reproduction cost any items of property were omitted. *Ibid.*

[12. Whether, in valuing for rate-making purposes the property of a street railway in Superior operated by the same company that operated the street railway in Duluth, a *pro rata* share of the company's investment in an amusement park in Duluth should have been taken into account, is not determined.] *Ibid.*

13. Failure to take into account items aggregating only $4,476 was not a substantial error affecting a decision by which, for rate-making purposes, the property of a street railway company was valued at $700,000. *Ibid.*

14. Although, before the recording of a city plat, an easement and right of way for street railway purposes in streets designated thereon was conveyed by the owner of the land to a street railway company, such company could not lay its tracks or operate its cars except in pursuance of a franchise granted by the city; and the railroad commission properly allowed nothing on account of such easement in valuing the property of the company for rate-making purposes, in the absence of any evidence as to what the value of such easement would be in case the company should in the future be authorized to carry freight or to run interurban cars and abutting owners should claim damages on the ground that an additional servitude was thereby imposed upon their property. *Ibid.*

15. Such grant of an easement in the streets having presumably been made to insure to the grantee the exclusive right to build a street railway in the city, its validity may well be doubted. *Ibid.*

Same: Review of decision of railroad commission.

16. A decision of the railroad commission as to what is a reasonable rate, if approved by the trial court, will not be disturbed by this court on appeal unless it is clearly wrong. *Duluth St. R. Co. v. Railroad Comm.* 245

17. A decision of the railroad commission in this case that, under all the circumstances, a return of seven and one-half per cent. per annum on the reasonable value of the street railway property in the city of Superior would be fair and adequate, and that the rates of fare should be adjusted accordingly, is sustained. *Ibid.*

18. Even if the railroad commission considered improper evidence in fixing rates to be charged by a street railway company, that fact would not be ground for reversal of the judgment of the circuit court based upon a trial *de novo* under sec. 1797—16, Stats. *International H. Co. v. Industrial Commission*, 157 Wis. 167, distinguished. *Ibid.*

19. Under sec. 1797—14, Stats., the railroad commission has no power to change rates unless they are found to be unreasonable or discriminatory; but where the commission found that the rates charged by a street railway company were "somewhat higher than they should be," and proceeded to fix a considerably lower rate, which it held to be reasonable and adequate, this was in substance a finding that the former rate was unreasonable. *Ibid.*

20. An order of the railroad commission requiring a street railway company to sell six tickets for twenty-five cents is not void on the ground that it unjustly discriminates against those who wish to purchase only a single ride. *Ibid.*

Injury to passenger: Jerking of car: Negligence of motorman.

21. The mere fact that a street car was suddenly jerked when it started, causing a passenger to fall, does not in itself establish negligence in the starting. *Tabak v. Milwaukee E. R. & L. Co.* 422

22. In an action for injuries to a passenger who fell while going from the platform to the inside of a street car, findings by the jury that the car was suddenly jerked so as to cause such fall and that the jerking was not due to any negligence of the motorman, are construed as showing no more than that the car started with the ordinary jerking of an electric street car in its usual operation. *Ibid.*

Injury to person: Collision with vehicle: Contributory negligence: Gross negligence of motorman.

23. In an action for injuries sustained when a north-bound street car struck plaintiff's wagon from the rear, the evidence most favorable to plaintiff—showing, among other things, that he drove slowly northward on the north-bound track of a double street railway track for more than 250 feet without looking to the rear, during the greater portion of which time he could have seen the approaching car had he looked, and that there was ample room to travel elsewhere than on the track in safety and comfort,—is *held* to show contributory negligence as matter of law. *Niederfriedrich v. Milwaukee E. R. & L. Co.* 439

24. The conclusion of the trial court that there was no evidence that the motorman of the car was guilty of gross negligence is *held* not so clearly wrong that it should be disturbed. *Ibid.*

STREETS AND ALLEYS. See EMINENT DOMAIN, 1, 2. HIGHWAYS. INJUNCTION, 5. LANDLORD AND TENANT, 4. MUNICIPAL CORPORATIONS, 7. TRIAL, 5.

SUBCONTRACTORS. See MECHANICS' LIENS, 2–4. PAYMENT, 3.

SUBROGATION.

Land subject to a mortgage given by the owner for his own indebtedness having been conveyed by him by deed with full covenants, reserving a life estate, and the grantee not having agreed to pay the mortgage, when the grantor thereafter, voluntarily and to protect his life estate, paid the debt and caused the mortgage to be discharged of record, he was not entitled, as against the grantee, to be subrogated to the rights of the mortgagee, even though he did not understand the effect of his covenants and paid the debt thinking, nevertheless, to preserve the lien. *Van Valkenburg v. Jantz,* 336

SUBSCRIPTIONS. See CORPORATIONS, 1–3.

SUMMONS: Service. See JUSTICES' COURTS, 3–5.

SUNDAY: Contracts. See GARNISHMENT, 3.

SUPERVISORS. See TOWNS, 1, 2.

SUPREME COURT. See APPEAL AND ERROR.

SURETYSHIP. See EXECUTORS AND ADMINISTRATORS, 2. GARNISHMENT, 2–4.

SURFACE WATERS. See MUNICIPAL CORPORATIONS, 7. WATERS.

SURRENDER of defendant by bail. See ARREST AND BAIL.

TAXATION.

Constitutional requirements and restrictions.

1. Under sec. 1, art. VIII, Const., as amended, the taxation of property and the taxation of incomes are to be considered as two separate and distinct things. *State ex rel. Manitowoc G. Co. v. Wis. Tax Comm.* 111

2. The taxing power of a state does not extend beyond its territorial limits, but within such limits it may tax persons, property, incomes, or business. *Ibid.*

3. Sec. 1042*j*, Stats. (ch. 367, Laws 1913), relating to the taxation of mineral rights and providing, among other things, that they shall be sold for nonpayment of taxes only to the owner of the fee or to the state, is unconstitutional in that it violates the guaranties of equal protection of the laws contained in the state and federal constitutions. The classification of real property thereby attempted cannot be justified. *State ex rel. Owen v. Donald,* 188

Annual tax when public utility is acquired by city: When unnecessary. See PUBLIC UTILITIES, 15.

Income tax: What is income: Annuities.

4. The yearly payments to an annuitant by trustees out of the income of property given to them by will for that purpose are not taxable as income of the annuitant, where the inheritance tax was duly paid upon the interest of the annuitant in the estate of the testator. *State ex rel. Kempsmith v. Widule,* 389

Same: Situs of income: "Derived from sources within the state."

5. If an interest in property is taxed, the situs of either the property or interest must be found within the state. If an income be taxed, the recipient thereof must have a domicile within the state or the property or business out of which the income issues must be situated within the state so that the income may be said to have a situs therein. [Whether an income may have a situs for taxing purposes different from that of its recipient is not determined.] *State ex rel. Manitowoc G. Co. v. Wis. Tax Comm.* 111

6. The situs of the security for a debt is not necessarily the situs of the evidence of the indebtedness. *Ibid.*

7. The Income Tax Law does not seek to reach property or an interest in property as such, but to reach incomes having a situs within the state or growing out of a privilege exercised or occupation conducted within the state, and sub. 3, sec. 1087*m*—2, Stats. 1911, levying an income tax upon nonresidents "upon such income as is derived from sources within the state or within its jurisdiction," must be construed to mean such income as issues directly from property or business located within the state, and not income from loans made therein, though secured by a trust deed upon property situated within the state. *Ibid.*

8. The purchase of a bond issued by a domestic corporation is the making of a loan of money to the obligor; its purchase by a nonresident does not constitute any business carried on within the state, and its situs remains at the domicile of the bondholder. Interest on such a bond, paid to a nonresident, is therefore not income "derived from sources within the state," within the meaning of sub. 3, sec. 1087*m*—2, Stats. 1911. *Ibid.*

Same: Income "derived from business transacted within the state:" Interstate commerce.

9. The income of a domestic manufacturing corporation derived from the sale of its products, manufactured in this state, to customers in this and other states, whether delivered directly from the factory to such customers or shipped to branch houses in other states and thence delivered to customers residing outside of the state on sales made either by the home office or by the branch houses, was income "derived from business transacted and property located within the state," within the meaning of sub. 3, sec. 1087*m*—2, Stats. 1911. *U. S. G. Co. v. Oak Creek,* 211

10. The fact that the business so conducted involved transactions in interstate commerce did not affect the situs of the income; nor did the imposition by the state of a tax upon such income contravene sec. 8, art. I, Const. of U. S., conferring upon Congress the power to regulate commerce between the states. *Ibid.*

11. That part of the income of such a corporation which was derived from goods produced and purchased outside of the state and shipped, either directly or by way of the home office in this state, to branch houses in other states and thence sold and delivered to customers without the state, was not attributable to business transacted within the state and was not taxable under the statute. *Ibid.*

Same: Income from without the state: Inheritance of land.

12. Assuming, but not deciding, that an inheritance, received by a resident of this state, of real estate located in another state is

income within the meaning of the state Income Tax Law, it is within the class of incomes derived from sources wholly without the state and therefore not taxable under that law. *State ex rel. Brenk v. Widule,* 396

Same: Recovery of illegal taxes: Conditions precedent.

13. The remedy by appeal to the state tax commission, given by sec. 1087*m*—19, Stats., to a person dissatisfied with any determination of the county board of review in respect to the assessment of his income, is not exclusive nor is such an appeal a condition precedent to the right to maintain an action for the recovery of illegal income taxes paid under protest. Such action may be maintained under sub. (4), sec. 1087*m*—22, and sec. 1164. *Horlick v. Mount Pleasant,* 366

14. The legislature having in sec. 1087*m*—18, Stats., expressly provided that the presentation of objections to the county board of review shall be a condition precedent to the right to maintain an action to question any assessment of income, no other conditions should be implied, where neither the situation presented nor the language of the statute unmistakably calls for implied conditions. *Ibid.*

15. The statutory remedy by appeal from the disallowance by a common council of a claim for repayment of income taxes paid under protest is not exclusive of the right to bring an action to recover such taxes; nor is approval of the assessor of incomes or of the tax commission as provided in sub. (4), sec. 1087*m*—22, Stats., a condition precedent to the maintenance of such action. *Field v. Milwaukee,* 393

Same: Who may question validity.

16. A corporation whose property was by sub. (b), sec. 1087*m*—3, Stats. 1911, made liable for the income tax upon the interest paid to its bondholders if the latter failed to pay such tax, may maintain an action questioning the validity of the tax. *State ex rel. Manitowoc G. Co. v. Wis. Tax Comm.* 111

Inheritance tax: Annuities: Allowance to widow.

17. An annuity given by will is subject to the Inheritance Tax Law, and the value *in præsenti* of the right to receive it may properly be appraised under sub. 4, 5, sec. 1087—15, Stats. *State ex rel. Kempsmith v. Widule,* 389

18. An allowance made to a widow, pursuant to sub. (2), sec. 3935, Stats. 1913, for her support and that of the children pending the administration of the estate of her deceased husband, is neither an inheritance nor a gift from the deceased made in contemplation of death and is not subject to an inheritance tax. *Smith v. State,* 588

19. There is no "transfer" of such allowance, within the meaning of that word as used in secs. 1087—1 to 1087—24, Stats. *Ibid.*

When partial invalidity avoids whole tax.

20. Where a part of a tax is invalid and the amount of the illegal portion is not capable of ascertainment, the whole tax fails. *State ex rel. Manitowoc G. Co. v. Wis. Tax Comm.* 111

Taxes on waterworks taken by city: By whom to be paid. See PUBLIC UTILITIES, 14.

Sales of land for taxes: Classification. See TAXATION, 3.

Same: Action to set aside taxes: Parties: Redemption.

21. In an action to set aside taxes for which land has been sold the holder of the tax certificate is a proper party, but the county is the real party in interest. *Gilkey & Anson Co. v. Doolittle,* 163

22. In an action directly attacking the validity of a tax certificate, or where a substantial part of the relief sought is the cancellation of a tax certificate, the certificate holder is a necessary party. *Ibid.*

23. Although holders of tax certificates have certain rights of which they cannot be deprived without their day in court, they are not particularly favored in the law, a purchaser at a tax sale not being a purchaser in good faith for value. *Ibid.*

24. Where, after action brought to set aside as illegal taxes for which land has been sold, a compromise is made with plaintiff by the county officers pursuant to sec. 1210*g*, Stats., payment by plaintiff of the amount thereby agreed upon constitutes a redemption from the tax sale and is binding upon the holder of the tax certificate, although he was not a party to the action and did not participate in the settlement. *Ibid.*

TAXATION OF COSTS: Time limited. See COSTS, 2.

TAX COMMISSION. See TAXATION, 13, 15.

TAXPAYERS' ACTION. See MUNICIPAL CORPORATIONS, 10, 11.

TAX TITLES. See TAXATION, 3, 21–24.

TENDER.

See VENDOR AND PURCHASER, 9.

Refusal of the holder to receive the amount due on a note because he claimed a larger sum, did not waive the tender or make it unnecessary to keep the tender good by payment into court as provided in Circuit Court Rule XV. *Weigell v. Gregg,* 413

TESTAMENTARY TRUSTEES: Failure to qualify. See EXECUTORS AND ADMINISTRATORS, 2, 3. TRUSTS AND TRUSTEES, 6.

THREATS. See PAYMENT, 4–7.

TITLE.

To personal property. See EXECUTORS AND ADMINISTRATORS, 1–3. GIFTS. TRUSTS AND TRUSTEES, 6.

To real property. See CONSPIRACY, 2, 3. DEEDS. EVIDENCE, 13. FRAUDS, STATUTE OF. HOMESTEAD. PARTNERSHIP. TAXATION, 21–24. TRUSTS AND TRUSTEES, 6. VENDOR AND PURCHASER, 2, 3, 8, 9. WILLS, 2–6.

TOLL ROADS. See TURNPIKES AND TOLL ROADS.

TORTS. See ANIMALS, 3–5. AUTOMOBILES. CARRIERS, 3. CONSPIRACY. CORPORATIONS, 5, 6. DAMAGES. DEATH. FRAUD. HIGHWAYS, 2–15. HUSBAND AND WIFE, 1. LIBEL AND SLANDER. MASTER AND SERVANT, 2–19. MUNICIPAL CORPORATIONS, 2. NEGLIGENCE. PLEADING, 3–5. RAILROADS, 2–8. STREET RAILWAYS, 21–24. WHARVES.

TOWNS.

See HIGHWAYS, 1, 9–13, 15. WATERS.

Town supervisors: Malfeasance: Transportation to meetings: Compensation: Traveling expenses.

1. The furnishing, by a member of a town board, of a conveyance to transport the members to and from their board meetings is not the purchase or sale of property or things in action nor a con-

tract, proposal, or bid in relation thereto, within the meaning of sec. 4549, Stats., but is rather in the nature of labor or services. *State v. Cleveland,* 457

2. The compensation of town supervisors being expressly provided for in sec. 850, Stats., and no provision being made for traveling expenses, they must themselves defray such expenses, and the allowance by the town board of bills for such expenses is a violation of that clause in sec. 4549 which makes it an offense for any town officer to do "any other act in his official capacity or in any public or official service not authorized or required by law." *Ibid.*

Ditch on adjoining land to drain highway: Owner's right to damages: When town bound by election as to nature of controversy.

3. Whether after a town had notified a landowner that in cutting a dike upon his land adjacent to a highway it was acting under sec. 1236, Stats., and after the town board had appointed appraisers to assess his damages under sec. 1237, and after the landowner had on appeal from their assessment recovered judgment for a larger sum, the town should on appeal from such judgment be held bound by its election to treat the controversy as one governed by said statutes, or might claim that they were inapplicable and that it was not liable for any damages,—is not determined. *Harvie v. Caledonia,* 314

TRADE: Unfair competition. See BANKRUPTCY.

TRADE-NAMES: Goods sold by: Implied warranties. See SALES, 3.

TRANSACTIONS WITH PERSONS SINCE DECEASED. See WITNESSES, 1, 2.

TRAVELING EXPENSES of officers. See TOWNS, 2.

TRESPASSERS. See ANIMALS, 4. RAILROADS, 3, 7, 8. WHARVES, 1.

TRIAL.

Place of trial. See VENUE.

Continuance. See CONTINUANCE.

Discontinuance: Trial of issue on counterclaim. See DISMISSAL AND NONSUIT.

Questions for jury. See ANIMALS, 5. BROKERS, 4. HIGHWAYS, 4, 5, 14. LIBEL AND SLANDER, 4, 8–10. MASTER AND SERVANT, 8, 9, 17, 19. RAILROADS, 3–6. STREET RAILWAYS, 23. WHARVES, 2.

Instructions to jury. See INSTRUCTIONS TO JURY.

Verdict: When perverse. See APPEAL, 7, 8. HIGHWAYS, 3.

1. A verdict contrary to an erroneous instruction is not necessarily perverse. Thus, where defendant's negligence was clearly proven and the jury found such negligence, even though in so doing they acted contrary to erroneous instructions, this court declines to hold the verdict a perverse one, the trial court having refused to set it aside on that ground. *Callahan v. Chicago & N. W. R. Co.* 288

Special verdict: Refusal to submit: Discretion.

2. Refusal to submit the issues for a special verdict, the demand therefor by defendant having come too late to make it a matter of right under sec. 2858, Stats., is *held* not to have been an abuse of discretion. *Callahan v. Chicago & N. W. R. Co.* 288

Same: Form: Refusal to submit proposed questions.

3. The form of a special verdict, so long as it covers the issues, rests largely in the discretion of the trial court. *Guillaume v. Wisconsin-Minnesota L. & P. Co.* 636

4. Where a party is entitled to have an issue submitted separately in the special verdict, the fact that the question or questions proposed by him do not fully cover that issue does not excuse refusal of the court to submit appropriate questions. *Schroeder v. Watertown,* 13

5. Having pleaded as a separate defense that at the time of an accident the decedent's horses were more than momentarily beyond his control and were actually running away, defendant was fairly entitled to have that issue directly and specifically submitted to the jury in the special verdict; but the jury having been instructed that if they found such loss of control over the horses existed and was responsible for the injury, then they must find that the defect in the street was not the proximate cause of such injury, the refusal to submit the issue in a separate question cannot be held prejudicial error, although the practice pursued is disapproved. *Ibid.*

6. A judgment for plaintiff having been reversed on a former appeal because of failure to submit certain questions to the jury, the rest of the special verdict not being regarded as improper, and such questions having been submitted on the second trial together with those submitted on the first, the refusal to submit other additional questions proposed by defendant is *held* not a prejudicial error. *Sadowski v. Thomas Furnace Co.* 86

7. Refusal to submit in the special verdict a question as to an evidentiary fact not put in issue by the pleadings is not error, especially where the matter involved was sufficiently covered by the verdict submitted and the charge given. *Taylor v. Northern Coal & Dock Co.* 223

8. Where an issue of fact is squarely raised by the pleadings and there is a request for the submission of a question covering such issue in the special verdict, it is, generally speaking, prejudicial error to refuse to submit such question; but where the proposed question does not cover facts specially pleaded a proper instruction covering the matter is a sufficient substitute therefor. *John E. DeWolf Co. v. Harvey,* 535

9. Thus, where a real-estate broker sued for an agreed commission on the sale of land and defendants claimed that the sale was not made in accordance with the terms of the agreement, it was not error to refuse to submit a proposed question as to whether the conduct of the parties showed that it was their intention that defendants should pay to plaintiff the reasonable value of the services rendered, the court having covered that matter in his charge. *Ibid.*

Same: Contributory negligence.

10. The correct practice is to submit for special verdict only one question on the subject of plaintiff's contributory negligence; but the submission of two questions partly covering the field and one wholly covering it, where the answers are consistent, was not a prejudicial error. *Fandek v. Barnett & Record Co.* 55

Same: Answers construed. See STREET RAILWAYS, 22.

Same: Changing answers. See RAILROADS, 6.

Same: Omission of controverted fact: Determination by court.

11. Where counsel for the respective parties were required by the trial court to specify their objections to the questions prepared by the court for a special verdict, but did not call attention

to the omission of any controverted matter of fact, any such matter so omitted will be deemed, under sec. 2858*m*, Stats., to have been determined by the court in conformity with its judgment. *Tabak v. Milwaukee E. R. & L. Co.* 422

Same: Conclusiveness on appeal. See APPEAL, 6–9.

Trial by court: Findings.

12. In a consolidated action to foreclose several mechanics' liens the findings of the trial court are not in this case properly subject to the criticism that they are too long and needlessly duplicated. *Sterling E. & C. Co. v. Berg,* 280

Same: Review of findings. See APPEAL, 10, 11, 16.

TRUST COMPANIES. See PRINCIPAL AND AGENT, 2–4.

TRUSTS AND TRUSTEES.

Validity of trust in personal property: Public charitable trusts.

1. Where a trust is in personal property only, the statute of uses and trusts (sec. 2081, Stats.) does not apply. *Rust v. Evenson,* 627
2. A trust in personal property is valid if it is for a lawful purpose and is sufficiently definite and certain so that a court can deal with and enforce it in the exercise of its judicial functions. *Ibid.*
3. Public trusts created by will, charitable in their nature and for the benefit of certain classes, whether in real or personal property, are necessarily somewhat indefinite and vague and the individuals can never be named; but if the class and the general limits of the testator's purpose be ascertainable by any reasonable means, his wishes will be carried out by the courts. *Ibid.*
4. Bequests to an incorporated church synod to be used and applied for the benefit of certain incorporated and unincorporated charitable and educational organizations within or under the control of the synod, and bequests to separately incorporated educational institutions conducted in the interest and under the auspices of the synod, are *held* to be valid public trusts. *Ibid.*
5. A provision in the will authorizing the synod to declare forfeited the last-mentioned bequests in case the said institutions ceased to be conducted in the interest and under the auspices of the synod, was valid. *Ibid.*

Testamentary trustees: Qualification: Title. See EXECUTORS AND ADMINISTRATORS, 2, 3.

6. The title to the trust estate cannot vest in a testamentary trustee until the bond required by sec. 4025, Stats., has been given and filed. *Karel v. Pereles,* 598

Trustee of an express trust: Who is. See WILLS, 2.

TURNPIKES AND TOLL ROADS.

Lease: Assignments: Title: Tenant holding over: Annulment of franchise: Ouster.

1. A corporation to which had been granted a franchise to construct and operate a toll road leased the road and the franchise for fifty years. After several successive assignments of the leasehold interest, one W., in an instrument assigning the same, purported also to sell and transfer to the assignee the road itself with all the franchises and everything connected therewith.

Thereafter, by ch. 103, Laws 1874, the lease was validated and the lessee and his assigns secured in the enjoyment of the property for said term. Subsequent assignments all declared that the intention was to convey the "lease and devise" assigned by W. In the absence of any showing that the original owner of the franchise had transferred or that there had been any judicial sale of the franchise and property, or any judgment against such owner, it is *held* that there can be no presumption that the ownership of the road and the franchise had vested in W. before he attempted to transfer them, and that each of the assignees took only the leasehold interest. *State ex rel. Att'y Gen. v. Steber,* 576

2. The existence of the lease being recognized in all the assignments, and the rights of each assignee after W. being expressly made referable to and measurable by the validated lease, parol evidence was inadmissible to show that the intention, when any of such transfers were made, was to convey the road and the franchise absolutely; nor could title by adverse possession be acquired by such assignees as against the original owner. *Ibid.*

3. An assignee of the leasehold interest who continued to operate the road after the expiration of the term was a tenant holding over; and when, thereafter, the original owner's corporate charter and all its privileges and franchises were annulled such assignee was properly ousted from exercising any such franchise or privilege. *Ibid.*

UNDERTAKINGS. See GARNISHMENT, 1–4.

UNDUE INFLUENCE. See GIFTS, 5.

UNFAIR COMPETITION in trade. See BANKRUPTCY.

USAGE. See HIGHWAYS, 2. PAYMENT, 2.

USES AND TRUSTS. See TRUSTS AND TRUSTEES, 1.

USURY. See INTEREST.

VACANCY in office. See SCHOOLS AND SCHOOL DISTRICTS.

VALUATION. See PUBLIC UTILITIES, 2–10. STREET RAILWAYS, 3–20.

VARIANCE. See CONTINUANCE. MASTER AND SERVANT, 10. PLEADING, 3, 4.

VENDOR AND PURCHASER OF LAND.

Validity of contract. See FRAUDS, STATUTE OF.

1. It is not necessary that a valid contract to convey land should contain any provision as to the adjustment of rents or taxes, the rights of the parties in those matters being fixed by law. *Chudnow v. Ketter,* 432

Construction of contract: "Warranty deed." See EVIDENCE, 13.

2. A contract to convey land by "warranty deed" calls for a deed containing the usual covenants of warranty, including the covenant that the land is free and clear from incumbrances. *Neff v. Rubin,* 511

3. Existing restrictions upon the use which may be made of land by the owner, with provision for reversion in case of violation, constitute such an incumbrance as to prevent the owner from giving a warranty deed. *Ibid.*

Modification or waiver of terms.

4. A letter from the attorney of the vendee of land stating in effect that his client would carry out the agreement of sale, though advised to the contrary by the attorney, upon receipt of the

warranty deed called for by said agreement, is *held* not to have been a waiver or modification of the terms of the contract. *Neff v. Rubin,* 511

Remedies of vendor: Waste: Discharge of vendee's debt under chattel mortgage statute.

5. A preliminary injunctional order restraining, at the suit of the vendor, the vendees in a land contract from committing waste by cutting timber on the land, is affirmed. BARNES, J., dissents, on the ground that the vendees' indebtedness for the purchase price had been discharged by the vendor's failure to file the affidavit required by sec. 2316c, Stats., after a sale of property under a chattel mortgage which the vendor had taken as additional security for the payment of said price. *Berntzon v. Edwardsen,* 180

Same: Action to set aside conveyance: Judgment: Lien for amount due: Interest.

6. Where the vendor of land, never having demanded payment of a demand note given for a part of the consideration, and treating such note as void and subject to be returned to the vendee, sought by equitable action to have the conveyance declared void for undue influence, but failed to sustain such claim of fraud, and the vendee was found to be indebted on the note according to its tenor, such vendor had no legal right to judgment for recovery on the note, but in order to do complete justice and terminate the litigation the court properly adjudged the amount due and provided for enforcement of a vendor's lien therefor. *Van Valkenburg v. Jantz,* 336

7. Interest on the note from the time of the commencement of the action was properly allowed in such case, the defendant not having offered to pay the note; but plaintiff should not have been awarded costs incidental to recovering on the note. *Ibid.*

Same: Correction of mistake: Assumption of mortgage. See REFORMATION OF INSTRUMENTS, 1.

Same: Payment of mortgage: Subrogation. See SUBROGATION.

Same: Annulment of covenants. See DEEDS.

Remedies of purchaser: Recovery of money paid.

8. Where the vendor of land cannot convey title as agreed in the contract of sale, the vendee may refuse further payment of the purchase price and recover the amount already paid thereon. *Neff v. Rubin,* 511

9. Where both parties to a contract for the sale of land finally treated it as ended and stood upon their legal rights consequent upon the breaches claimed, the vendee was not required to tender a return of the writing embodying the contract in order to entitle him to recover the purchase money which he had paid. *Ibid.*

Same: False representations by vendor. See FRAUD, 1–7.

VENDOR'S LIEN. See VENDOR AND PURCHASER, 6.

VENUE.

See REMOVAL OF CAUSES.

Where a machine was repaired by a domestic corporation in the county where it had its place of business and was there delivered to the owner, a corporation having its place of business in another county, the cause of action for labor and materials fur-

nished arose at the time and in the county of such delivery, in the absence of any agreement or any recognized custom of business between the parties to the contrary; and the action is therefore properly triable in that county under sub. 5, sec. 2619, Stats. *State ex rel. Gurney L. Co. v. Risjord,* 118

VERDICT. See TRIAL, 1–11.

VESTED ESTATES. See HOMESTEAD, 4.

VICIOUS ANIMALS. See ANIMALS, 3–5.

VILLAGES: Widening street. See EMINENT DOMAIN, 1, 2.

WAIVER.
Of defects on appeal. See APPEAL, 4.
Of right to dismissal of action. See APPEAL, 18.
Of conditions in contract. See CONTRACTS, 8, 9.
Of claim based on fraud. See FRAUD, 5.
Of tender. See TENDER.
Of objections to special verdict. See TRIAL, 11.

WARNING of danger. See MASTER AND SERVANT, 8. WHARVES.

WARRANTY: When not implied. See SALES, 3.

WARRANTY DEEDS. See VENDOR AND PURCHASER, 2, 3.

WASTE. See VENDOR AND PURCHASER, 5.

WATERS.

Surface waters. See MUNICIPAL CORPORATIONS, 7.

1. A town is not particularly favored in the law over a private proprietor in dealing with surface water, except that it has what is the equivalent of the right of condemnation. *Harvie v. Caledonia,* 314

2. At common law the upper proprietor had no easement or servitude in the land of the lower one which entitled him to an unobstructed discharge of surface water on the lower land. The lower proprietor might fight off the flow as best he could, and for that purpose had a right to construct a dike or embankment on his own land so as to keep the water off. *Ibid.*

3. If, as an exception to the general rule, a dam or dike may not be built across a narrow valley or ravine where the result would be to submerge a considerable part of the land drained through such valley or ravine,—a point not decided,—the mere fact that land is hilly or that surface water from a considerable area may be drained at a certain place is not sufficient to bring a case within such exception. *Ibid.*

4. The easement acquired by a town upon legally laying out a highway does not carry with it a right to the unobstructed flow of surface water over the adjacent lands, and the adjacent proprietors may, by dikes on their own land outside of the limits of the highway, keep back the surface water coming from the highway; and in so doing they do not violate the law as to obstruction of the highway. *Ibid.*

WATERWORKS: Acquirement by city. See PUBLIC UTILITIES, 2–17.

WHARVES.

Injury to person repairing vessel: Licensee: Negligence: Contributory negligence: Warning of danger. See INSTRUCTIONS TO JURY, 3.

1. Plaintiff's intestate, a ship carpenter who, to the knowledge of and without objection from defendant, was lawfully engaged in repairing a vessel while its cargo of coal was being unloaded at defendant's dock, was not a trespasser but was entitled at least to the privileges and protection of a licensee; and the defendant was bound to so act as not unnecessarily to increase the danger to him or render the premises more dangerous without notifying him of such fact. *Taylor v. Northern Coal & Dock Co.* 223
2. Evidence tending to show, among other things, that said intestate and his crew had started to work on the side of the vessel under the hoisting rig by which the coal was being taken from the hold, at a time when defendant was making some repairs on such rig; that defendant knew of their presence under the rig; that in the usual operation of the rig lumps of coal dropped from the buckets; that no warning was given to deceased before the rig was started again; and that shortly after it was started a lump of coal fell and struck him, causing his death—is *held* sufficient to show negligence on the part of defendant, and not to establish contributory negligence of the deceased as matter of law; hence there was no error in refusing to direct a verdict for defendant. *Ibid.*
3. If in such case defendant's employees knew the deceased was in a place of danger, or ought to have so known, it was their duty to give warning. *Ibid.*

WILLS.

Construction: "Death" of legatee.

1. A testator having bequeathed certain legacies to persons residing in Germany whom he had not seen or corresponded with for more than twenty years, and having, by a clause applicable only to this class of legatees, provided that "in case of the death of either" of such legatees her legacy "shall be payable to the legal heir or heirs of such legatee," it is *held* that such clause was intended to apply to death of a legatee either before or after the making of the will. *Flemming v. Griem,* 608

Same: Legacy charged on property: Limitation of actions.

2. A devisee of land subject to the payment of a legacy charged as a lien thereon is not a trustee of an express trust, and an action by the legatee to enforce the lien may be barred by the statute of limitations. *Merton v. O'Brien,* 117 Wis. 437, followed. *Nolan v. First Nat. Bank,* 22
3. The fact that the devisee is made executor of the will does not change the rule above stated, since the duty to pay the legacy devolves upon him as devisee, not as executor. *Ibid.*
4. Even if, in such case, the devisee could not, as executor, invoke the bar of the statute, he might do so where he had been fully discharged as executor more than six years before the action was commenced. *Ibid.*
5. Where the legacy so charged upon land provided for payment of a sum annually, a failure to pay for any one year gave the legatee

a legal as well as an equitable remedy; and when the six-year statute barred the legal remedy it barred also the equitable one. *Ibid.*

6. Where land, including testator's homestead, was devised to his son charged with the support and maintenance of the widow at said homestead so long as she should wish to remain there, and further charged with the payment of a certain sum annually to her "any year or years when she may for any reason reside elsewhere" than with said son, such language implies that no account should be taken of any absence less than a year; and where in each year the widow spent, in two or more separate visits, from one to four months with a daughter who lived in the same city a few blocks away—her room, furniture, etc., being all the time kept ready for her at the son's house,—no payments of money became due on account of such absences. *Ibid.*

Same: Charitable trusts: Validity. See TRUSTS AND TRUSTEES, 3–5.

Testamentary trustees: Qualification. See EXECUTORS AND ADMINISTRATORS, 2, 3. TRUSTS AND TRUSTEES, 6.

WITNESSES.

Competency: Transaction with decedent.

1. The question being as to whether a deceased father had in his lifetime made a certain gift to his son, the son was not competent to testify as to transactions or communications personally had with the father concerning which no witness had been examined in behalf of the opposite party. *Hilton v. Rahr,* 619

2. In such case, where the son had been examined under sec. 3825, Stats., at the instance of the father's executors, his testimony then given was not admissible in his behalf. *Ibid.*

Same: Privileged communications: Physicians.

3. Under sec. 4075, Stats. 1913,—providing in substance that no physician or surgeon shall be *permitted* to disclose information received by him while attending a patient and which information was necessary to enable him to treat such patient,—in a personal injury action a physician who treated the plaintiff after the injury was properly not permitted to state whether he treated plaintiff at that time for hernia or rupture or whether plaintiff complained to him of hernia or rupture. *Dreyfus v. Milwaukee E. R. & L. Co.* 524

Credibility: Impeachment of adverse witness.

4. An adverse witness, called under sec. 4068, Stats., may be asked impeaching questions by the party calling him, for the purpose of showing that he previously made contradictory statements. *Sadowski v. Thomas Furnace Co.* 86

WORDS AND PHRASES.

Accidentally sustained, in statute. See WORKMEN'S COMPENSATION, 6–9.

Action against corporation, in statute. See CORPORATIONS, 7.

Assumption of risk, in statute. See MASTER AND SERVANT, 15–18.

Blind nailing, in contract. See CONTRACTS, 6.

Cases in this class, in statute. See WORKMEN'S COMPENSATION, 11.

Charitable, charity. See CORPORATIONS, 6.

Collusion. See CONSPIRACY, 1, 2.

Contract, proposal or bid in relation to property, in statute. See TOWNS, 1.

Contributory negligence. See MASTER AND SERVANT, 14–18.
Death of legatee, in will. See WILLS, 1.
Dependent for support, in statute. See WORKMEN'S COMPENSATION, 14.
Derived from business transacted within the state, in statute. See TAXATION, 8–11.
Derived from sources within the state, in statute. See TAXATION, 7, 8, 12.
Duress. See PAYMENT, 5.
Employee, in statute. See WORKMEN'S COMPENSATION, 1.
Establish to the full satisfaction, etc., in statute. See PUBLIC UTILITIES, 17.
Existed for three weeks, in statute. See HIGHWAYS, 13.
Few minutes, in pleading. See DEATH, 2.
Gift made in contemplation of death, in statute. See TAXATION, 18.
Going value. See PUBLIC UTILITIES, 4.
Holder in due course, in statute. See BILLS AND NOTES.
Homestead, in statute. See HOMESTEAD, 3.
Income. See TAXATION, 12.
Inheritance, in statute. See TAXATION, 18.
Judgment. See JUDGMENT, 1, 2.
Lawful compensation, in finding. See PUBLIC UTILITIES, 16.
Long account, in statute. See REFERENCE, 1.
Loss of a member, in statute. See WORKMEN'S COMPENSATION, 10.
Member of the family, in statute. See JUSTICES' COURTS, 4. WORKMEN'S COMPENSATION, 15.
Minors who are legally permitted to work, in statute. See WORKMEN'S COMPENSATION, 1.
Municipal corporation. See MUNICIPAL CORPORATIONS, 1.
Necessitous circumstances, in statute. See HUSBAND AND WIFE, 3.
Order a new trial, in statute. See APPEAL, 17.
Performing services growing out of and incidental to his employment, in statute. See WORKMEN'S COMPENSATION, 2–5.
Personal injury, in statute. See WORKMEN'S COMPENSATION, 7.
Proximately caused by accident, in statute. See WORKMEN'S COMPENSATION, 6–9.
Purchase or sale of property, etc., in statute. See TOWNS, 1.
Purchaser in good faith for value. See TAXATION, 23.
Reside elsewhere, in will. See WILLS, 6.
Securely guarded, in statute. See MASTER AND SERVANT, 9.
Transfer, in statute. See TAXATION, 19.
Used or kept for the purpose of carrying on his business, in statute. See EXEMPTIONS.
Warranty deed, in contract. See EVIDENCE, 13. VENDOR AND PURCHASER, 2, 3.
Year or years when she may reside elsewhere, in will. See WILLS, 6.

WORK AND LABOR. See MASTER AND SERVANT, 1. VENUE.

WORKING PLACE: Safety. See MASTER AND SERVANT, 5–9.

WORKMEN'S COMPENSATION.

Liability of master for injuries to servant. See MASTER AND SERVANT, 2–19.

Who are "employees:" Minors.

1. In sub. (2), sec. 2394—7, Stats., the words "minors who are legally permitted to work under the laws of this state," used in defining the term "employee" in the Workmen's Compensation Act, are not to be restricted so as to apply only to minors permitted to be

employed in the precise work in which the accidental injury in question was sustained, but are to be given a broad, comprehensive meaning, so as to include all minors who are permitted, under the laws of the state, to work at any gainful occupation under any circumstances. *Foth v. Macomber & W. R. Co.* 549

Conditions of liability: Performing services incidental to employment.

2. An employee who, as the result of drinking polluted water furnished by the employer at its factory, became sick with typhoid fever, was at the time of such injury "performing service growing out of and incidental to his employment," within the meaning of sec. 2394—3, Stats. *Vennen v. New Dells L. Co.* 370

3. While a plumber was attempting to unscrew the locknut of the hot-water cock of a wash bowl in a private residence, some substance fell into his eye, causing him pain, and impelling him to rub the eye frequently. Thereafter a gonorrhœal infection developed in the eye and he lost the sight thereof. He had had no such infection previously, and none developed elsewhere, but it was purely conjectural, and the industrial commission did not find, whether the infection of the eye came from the substance which fell into it, or from rubbing it with an infected cloth, or washing it in infected water, or in some other way. *Held*, that he was not entitled to compensation, it not appearing that the loss of the eye proximately resulted from an injury "incidental to and growing out of the employment." *Voelz v. Industrial Comm.* 240

4. Where a night workman, whose duties took him to all parts of the bottling house of a brewery, was found between 8 and 9 o'clock p. m. lying, unconscious and with bruises on his head and shoulder, on the basement floor beneath a guarded temporary opening in the floor above, and died on the following morning, findings by the industrial commission that his death was caused by an accidental injury sustained while he was "performing services growing out of and incidental to his employment," were not wholly unsupported by the evidence, although there was no direct evidence showing what he was doing at the time. *Heileman Brewing Co. v. Shaw,* 443

5. The competent evidence in this case is *held* to support a finding of the industrial commission that deceased received the injury which caused his death on the night in question while in the employ of the bank and performing services growing out of and incidental to his employment. *First Nat. Bank v. Industrial Comm.* 526

Same: Injury "accidentally sustained" or "proximately caused by accident." See EVIDENCE, 2, 3.

6. A personal injury "accidentally sustained" or "proximately caused by accident," within the meaning of sec. 2394—3, Stats., may be one which resulted from carelessness or negligence. The words should be given, as intended by the legislature, their popular meaning. *Vennen v. New Dells Lumber Co.* 370

7. Typhoid fever contracted by an employee as the result of drinking polluted water furnished by the employer is a "personal injury accidentally sustained" and "proximately caused by accident," within the meaning of sec. 2394—3, Stats. *Ibid.*

8. A finding by the industrial commission that the miliary tuberculosis from which an employee died on June 16, 1914, was proxi-

mately caused by an explosion of gas by which he was injured on February 7, 1914, is *held* to have been warranted by the evidence. *Heileman Brewing Co. v. Industrial Comm.* 46

9. A finding by the industrial commission that adenitis of the lymphatic glands in the groin, by which an employee was disabled, was the proximate result of an accidental injury sustained while he was engaged in loading a barrel of soap upon a wagon, is *held* to be supported by the evidence. *Eagle Chemical Co. v. Nowak,* 446

Scale of compensation: "Loss" of a member.

10. The "loss" of a member, within the meaning of the schedule in sub. (5), sec. 2394—9, Stats., means the actual physical severance of it, not an impairment of its use; and it was error to award compensation under that schedule to an employee for an injury by which, as the industrial commission found, he would be "partially permanently disabled in his left forearm to an extent equivalent to a one-half loss of said forearm." *Northwestern Fuel Co. v. Industrial Comm.* 450

11. The further provision in said sub. (5), sec. 2394—9, with respect to "all other cases in this class," refers to the injuries mentioned specifically in the schedule, and was not intended to include impairment occasioned by an injury not there named. *Ibid.*

12. Injuries for which provision is not made in said schedule are to be compensated for under other general provisions of the statute. *Ibid.*

Death of employee: Who are dependents.

13. Dependence of parents upon their children will not be presumed; and parents claiming to be so dependent must, under sub. 3, sec. 2394—10, Stats., establish that fact by a preponderance of the evidence, the burden of proof being the same as in an ordinary civil action. *Wisconsin D. Co. v. Industrial Comm.* 42

14. Evidence in this case that a deceased employee was accustomed to turn over to his mother a part of his earnings; that she spent the same for family support, as he probably supposed she would; and that it took all the money so turned over, and the ordinary family income as well, to meet the expenses, is *held*—even though the son expected to be paid back sometime when he needed the money to buy a farm—to sustain a finding of the industrial commission that the parents were partially dependent on him for support. *Ibid.*

Same: "Member of the family."

15. Compensation for the death of an employee cannot be recovered by a woman who was living with him in good faith as his wife but whose supposed marriage with him was void because it took place within a year after his divorce from a former wife. In such a case she was not a "member of the family of the deceased" within the meaning of sub. 4, sec. 2394—10, Stats., that statute being intended to cover legitimate and not illicit ties; and it is not material that she may have been dependent on him for her support. *Armstrong v. Industrial Comm.* 530

Industrial commission: Findings and award: When not disturbed.

16. A finding of fact made by the commission cannot be based on mere conjecture any more than a finding of fact made by the court. *Voelz v. Industrial Comm.* 240

17. If in any reasonable view of the evidence it will support either directly or by fair inference the findings of the industrial commission, such findings are conclusive upon the court. *Eagle Chemical Co. v. Nowak*, 446

18. If there is any basis in the evidence for findings of the industrial commission they will not be disturbed by the court. *First Nat. Bank v. Industrial Comm.* 526

19. An award of compensation by the industrial commission will be reversed on the ground of insufficiency of evidence only when there was no evidence tending to support it. *Heileman Brewing Co. v. Industrial Comm.* 46

20. Under sec. 2394—19, Stats., an award of the industrial commission must be supported by its findings of fact, and every finding must have some substantial evidence in its support, though not necessarily the preponderance of the evidence. *Voelz v. Industrial Comm.* 240

21. The industrial commission acting as an administrative board is not held to the same strict rule with respect to rulings on the admission of evidence as courts of law; and the admission of incompetent evidence will not operate to reverse the award if there is any basis in the competent evidence to support it. *First Nat. Bank v. Industrial Comm.* 526